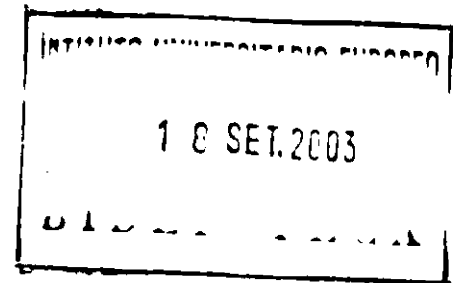




European University Institute

Department of Law



Human Rights in the Evolving Constitutional Structures of Sub-Saharan Africa

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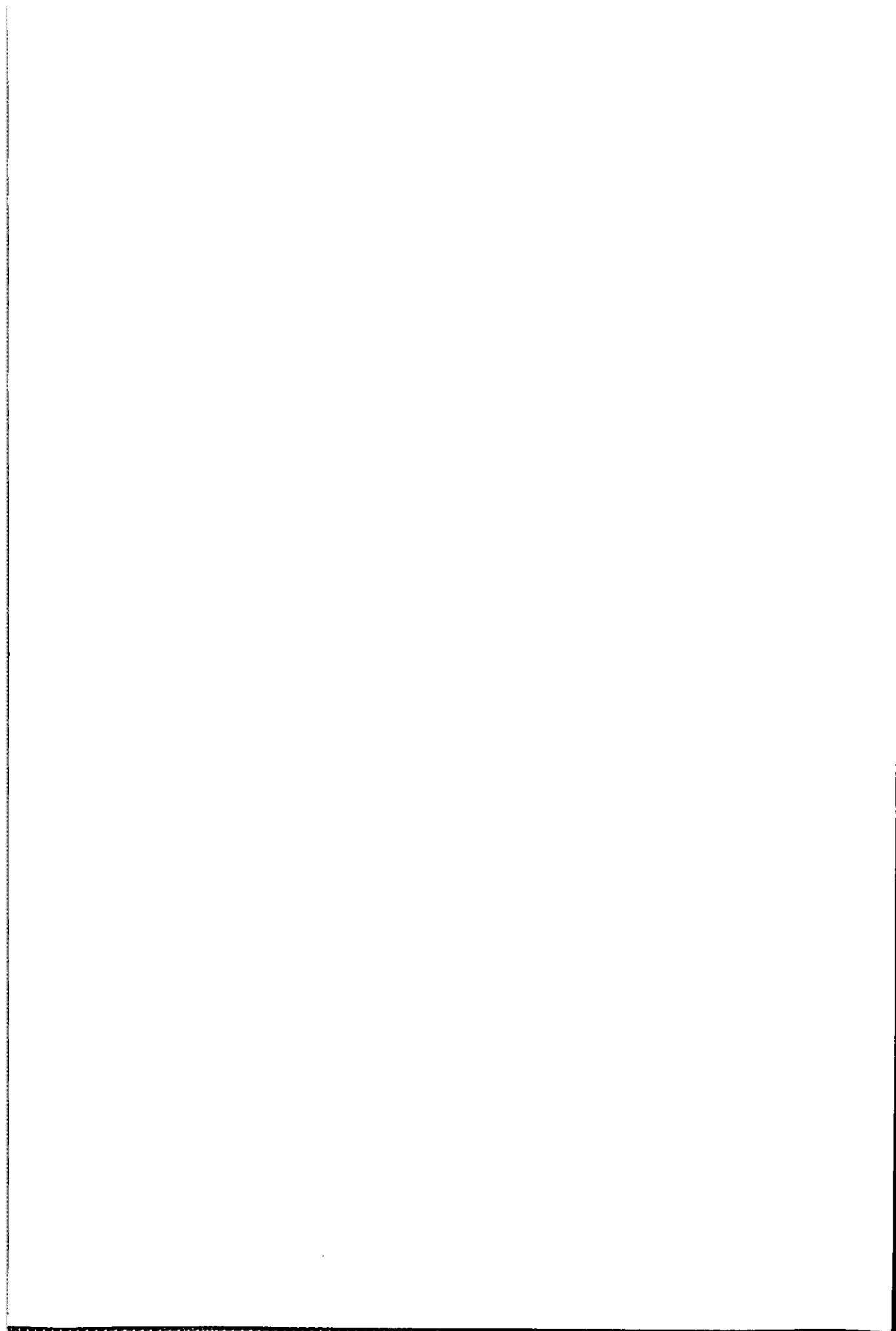
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ACRONYMS

AFRONET	Africa Network for Human Rights and Development
ANC	African National Congress
ASSODIV	Association pour le Développement des Initiatives Villageoises
CBDH	Commission Béninoise des Droits de l'Homme
CCC	Committee for a Clean Campaign
CCJP	Catholic Commission for Justice and Peace
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CENA	Commission Électorale Nationale Autonome
CP 21	Club Perspective 21
CSA	Confédération des Syndicats Autonomes
EMGTP	Collectif des Professeurs des Enseignements Moyens Général Technique et Professionnel
FARD	Front d'Action pour le Renouveau et le Développement
FODEP	Forum for a Democratic Process
HCR	Haut Conseil de la République
HIPC	Highly Indebted Poor Countries Initiative
ICCPR	International Convention on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
ILO	International Labour Office
I/PRSP	Interim Poverty Reduction Strategy Papers
INEPR	Interim New Economic Recovery Programme
IMF	International Monetary Fund
IPD	Impulsion au Progrès et la Démocratie
IPEC	International Programme for the Elimination of Child Labour
JCTR	Jesuit Centre for Theological Reflection
LRF	Zambian Legal Resource Foundation
MADEP	Mouvement Africain pour la Démocratie et le Progrès
MERCI	Mouvement de l'Engagement et le Réveil du Citoyen
MMD	Movement for Multiparty Democracy

NICMD	National Interim Committee for Multiparty Democracy
NPP	National Progressive Party
OUA	Organisation of African Unity
PCE	Permanent Commission of Enquiry
PCD	Parti Communiste de Dahomey
PDD	Parti Démocratique Dahoméen
PDU	Parti Dahoméen de l'Unité
PRB	Parti de la Renaissance du Bénin
PRD	Parti Républicain du Dahomey
PRD	Parti du Renouveau Démocratique
PRPB	Parti Révolutionnaire du Peuple Béninois
PRSP	Poverty Reduction Strategy Papers
PSD	Parti Social Démocrate
RDD	Rassemblement Démocratique Dahoméen
SNES	Syndicat National de l'Enseignement Supérieur
SysAPOSTEL	Syndicat National des Postes et Télécommunications
TANU	Tanzania African National Union
UBF	Union pour le Bénin du Futur
UDD	Union Démocratique Dahoméenne
UDHR	Universal Declaration of Human Rights
UGEED	Union Générale des Etudiants et Elèves du Dahomey
UNAIDS	Joint United Nations Programmes on HIV/AIDS
UNSTB	Union Nationale des Syndicats des Travailleurs du Bénin
UNZALARU	University of Zambia Lecturers and Research Unions
UPND	United Party for National Development
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNICEF	United Nations Children's Fund
UNIP	United National Independence Party
UPP	United Progressive Party
WB	World Bank
WHO	World Health Organisation
ZAMTEL	Zambia Telecommunications Company
ZARD	Zambian Association for Research and Development

ZCMM	Zambia Consolidated Copper Mines
ZCTU	Zambia Congress of Trade Unions
ZDC	Zambia Democratic Congress
ZESCO	Zambia Electricity Supply Corporation
ZIMT	Zambian Independent Monitoring Team
ZNCB	Zambia National Commercial Bank
ZPA	Zambian Privatization Agency



INTRODUCTION

When the terms 'human rights' and 'sub-Saharan Africa'¹ are used together pessimistic comments are usually heard. In the early 1990s, this pessimistic outlook seemed to have subsided and in certain cases, it was even replaced by sentiments of hope that were aroused by the fall of authoritarian regimes and the start of democratisation processes, which were marked by the reintroduction of political pluralism. This period has even been referred to as a 'second independence' for Africa after that of the European colonial domination. All of the states which had been dominated by one-party or military systems, some of which were inspired by the Soviet Socialist model, held multi-party elections and in succession, almost all of them adopted new constitutions or amended existing ones. The liberal-democratic model, which had been harshly questioned both in theory and practice until the end of the 1980s, became the common paradigm. The new constitutions sanctioned a model of political organisation based on the principles of the rule of law, the separation of powers, multiparty democracy and the respect for fundamental rights and freedoms. The constitutional developments which occurred in sub-Saharan Africa are mirrored on a global level, as seen in the rise of the liberal-democratic form of political organisation as the "universal" model on which the legitimacy of states seems to depend, following the collapse of the Soviet Union and the Eastern European communist systems.² Certain authors have spoken of a "*mondialisation de l'État de droit*",³ which signifies a state's adherence to the rule of law and the respect of human rights.

However, the reference to the liberal-democratic paradigm and the constitutional protection of human rights were not a new experience for the region. Almost all of the constitutions of sub-Saharan African countries, which achieved their independence from the European colonial powers between the late 1950s and early 1960s,⁴ were designed on this model and recognised, in different degrees, human rights.

The independence constitutions were rather short-lived. Within a few years, a new constitutional phase opened up in sub-Saharan Africa. The independence constitutions were

1 Sub-Saharan Africa is the term used to define the states lying south of the Sahara. These countries present a number of common features. With the exception of Liberia, all of them were subjected to European colonisation and attained their independence after the Second World War. Moreover, they have experienced common constitutional and political developments.

2 G. Amato, "Forme di stato e di governo", in G. Amato e A. Barbera (a cura di), *Manuale di diritto pubblico*, Il Mulino, Bologna, 1994, p. 59.

3 J. Chevallier, "La mondialisation de l'État de droit", in M. Borgetto (coordination), in *Mélanges Philippe Ardant. Droit et politiques à la croisée des cultures*, L.G.D.J., Paris, 1999, p. 325 et seq.

4 Only Angola, Mozambique, South Africa, Namibia and Zimbabwe, gained independence from European rule later.

de facto not applied, or often replaced by new charters, which did not include any human rights protection in certain cases. Some were amended or suspended following coups d'état. In this way, the one-party systems and military regimes, together with the state inspired by the Soviet model, prevailed in the political landscape of sub-Saharan Africa until the early 1990s. This evolution was justified by the alleged distance of the constitutional systems adopted at independence with traditional African culture and their inability to deal with the problems inherited from the decades of colonialism. These included underdevelopment and the need for nation building. In particular, the liberal human rights model embodied in the independence constitutions was under attack. The polemic against this model was mirrored in a lively scholarly debate, involving both African and Western academics, on the relevance of a human rights model for Africa, which was based almost exclusively on civil and political rights. In particular, two problematic issues were raised. The first pertained to the definition of (liberal) human rights, which is built upon the notion of the individual as an autonomous being, and, thus, was considered as an alien concept in African culture. The second issue concerned the non-viability of a human rights model centred on civil and political rights in states which had to face the challenge of development and which were also weakened by centrifugal forces. It was contended that the guarantee of civil and political liberties would hinder the efforts of the independent African states to deal with the problems of underdevelopment and to forge national unity among the diverse ethnic and religious groups, which had been forced to co-exist within artificially created borders by European powers.

This debate seems to have disappeared in sub-Saharan Africa since the 1990s when the liberal human rights model was again constitutionally recognised and enriched, albeit to different degrees, by the protection of social, economic and cultural rights as well as the so-called third generation rights. Moreover, contemporary African rulers do not appear to, at least openly, claim a distinct African human rights model alternative to the "Western" one and African civil societies have demonstrated an increasing concern regarding human rights. However, the persistence of autocratic and nepotistic behaviour by current leaders and a poor human rights record in many sub-Saharan African countries question the extent to which the constitutionalisation of human rights corresponds with a real appreciation of their meaning and a commitment to their observance. Taking into account the early experience of liberal constitutionalism in sub-Saharan Africa, and in particular, the resistance to the protection of individual rights and freedoms which belong to the liberal tradition, it could be asked whether history is simply repeating itself. In other words, is sub-Saharan Africa witnessing a renewed

experience of the '*mimétisme*'⁵ and are the constitutions currently in force destined to encounter the same obstacles faced by the constitutions of the 1960s?

In order to address this question, a number of sub-questions will be dealt with: Firstly, is the human rights model of the constitutional charters of the 1990s exactly the same as in those of the 1960s? Secondly, who are the actors behind the renewed and reinforced protection of individual rights and freedoms in the sub-Saharan African constitutions? Thirdly, what are the respective motivations of these actors and what is the relationship between them? Finally, what is the status of implementation of human rights constitutional provisions and what is the attitude of civil society vis-à-vis human rights?

To answer these questions, this thesis analyses the three constitutional cycles which sub-Saharan Africa has undergone and which have been characterised, respectively, by the import of the liberal-democratic model; the questioning of this model; and finally its reintroduction.

Considering that the overwhelming majority of sub-Saharan African states were either British or French colonies and that colonization has affected their constitutional and political developments, this thesis concentrates on Anglophone and Francophone Africa⁶ and each of these will be dealt with separately. Zambia and Benin are the respective case studies which will be considered in detail. These countries were chosen due to the fact that they provide a clear representation of the constitutional developments of sub-Saharan Africa and notably, of the three political systems which typified the region until the end of the 1980s. Both achieved their independence in the 1960s and had constitutions modelled on those of their colonial masters and included a human rights protection inspired by liberal sources. In addition, Zambia became a one-party state in 1972. Benin, which was marked by high political instability reflected in the succession of six constitutions, experienced both military and Marxist regimes. Finally, Zambia and Benin were the first countries in English-speaking and French-speaking Africa, respectively, to reintroduce democratic systems and to adopt new constitutions fully adhering to the liberal democratic-model in the 1990s.

The thesis is structured in three parts, which correspond with the three constitutional phases experienced by sub-Saharan Africa. Each of these parts analyses the constitution-making processes and, in particular, the provisions concerning human rights. An analysis of the constitution-making process allows for the identification of the actors that were

⁵ This is the term employed by French scholarship to describe the development of African constitutionalism and defined by Chevallier as a phenomenon "*qui passe par des emprunts à des systèmes étrangers érigés en modèles de référence*" and "*qui n'est que l'enveloppe formelle de rapports de domination*"; see Chevallier, cit., p. 333.

⁶ In the thesis the term Francophone Africa does not include former Belgian colonies.

responsible for the adoption of the specific constitutional model during the phase under investigation and also for the discovery of the underlying rationale of these events.

The first part of the thesis concerns the constitutions adopted at independence and examines not only their content with regard to the human rights protection, but also the factors which determined the import of the liberal human rights model. To this end, the examination of the role played by the colonial powers and African nationalist leaders, their interests and relative power relations are analysed.

The second part of the thesis inquires into how sub-Saharan African countries became one party systems, military and Marxist regimes, and how these systems have impacted upon the conception of human rights embodied in the new constitutional systems and also on their actual implementation. Moreover, it critically evaluates the arguments developed by African governments who argued that the liberal model of human rights was inadequate for sub-Saharan Africa. Even though these arguments were used by African leaders to preserve their position of power, they also raise some important issues. The liberal model of human rights met serious obstacles in sub-Saharan Africa. This thesis interprets the findings of the study of both the constitution-making processes of the first constitutional phase (carried out in part one) and the status of human rights during the second constitutional cycle through the lens of the scholarship on legal transplants. This scholarship provides the analytical instruments to clarify the dynamics elicited by the adoption of the liberal human rights model upon independence and to establish why and to what extent this model has 'failed' in sub-Saharan Africa.

The third part of the thesis follows the same organisation as part one. It examines the constitution-making processes, the content of the human rights provisions in the constitutions and also the actual human rights' record of Zambia and Benin. Furthermore, the domestic discourse on human rights is also considered. The actors which are taken into account include African governments, African civil society and international actors, including donor countries, Bretton Woods institutions and international non-governmental organisations (NGOs). This approach is adopted in order to contextualise the analysis of Zambia and Benin's constitutional developments by inserting them in the global context of the evolution of international human rights law and international relations.

The conceptual framework developed and employed in the second part of this thesis is used to deal with the crux of the thesis, in other words, to ascertain the extent to which a new phase in the constitutional history of sub-Saharan Africa actually occurred in the 1990s or, conversely, whether Africa is experiencing a phase similar to the one that occurred at the end

of the European colonial rule, when the enthusiasm and expectations aroused by the independence struggle and the achievement of independence were bitterly disappointed.

African constitutional developments of the 1990s require an historicist reading, which takes into account not only the post-independence period, but also pre-colonial and colonial history and interprets them as interrelated phases, in which each period is influenced by the preceding one. The other main underlying idea of the thesis is that African constitutional developments cannot be understood without taking into account the changes which have taken place in African cultural categories and societal structures since pre-colonial times and the complex relationships of dependence between sub-Saharan Africa and external actors, ranging from former colonial powers, donor countries, Bretton Woods institutions and international civil society. The developments occurring within Africa are also the outcome of dynamics triggered off by such relations.

Finally, the main challenge of this thesis lies in the interpretation of the role of human rights in the contemporary African constitutional systems by analysing the complexities of the discourses in sub-Saharan Africa. Much of the literature in this area dealing with the interpretation and evaluation of the status of human rights within the African constitutional framework is carried out by merely examining the action of governments or African society, thus assuming that uniform entities existed everywhere. Conversely, this thesis argues that African human rights constitutional developments can only be effectively grasped if a variety of domestic actors are taken into account and their diverse cultures and interests are recognised. It is not only the position of African governments and African civil society vis-à-vis human rights which differs, but the understanding of human rights even varies within civil society. These differences can be determined by gender, age, social status, level of education and "acculturation" (in respect to Western models).

PART I: HUMAN RIGHTS AND INDEPENDENCE AFRICAN CONSTITUTIONS: THE 'TRANSPLANT' OF THE LIBERAL MODEL

The first constitutions of independent sub-Saharan African states were adopted between the late 1950s and early 1960s in the wave of the decolonisation process, which affected most of the sub-Saharan African countries. The issue of the building of constitutional systems was solved by adopting constitutional charters shaped on the constitutional orders of the colonial powers, which involved the transplanting of the liberal-democratic principles and institutions in the region. It is interesting to note that the human rights conception embodied in African constitutions was more liberal than those in Europe. With regard to the constitutions of Francophone Africa, Vasak has pointed out that they were closer to the liberal legacy of the French revolution of 1789 than to the human rights orientation which emerged in the Europe after the second World War,⁷ which was enriched by social, economic and cultural rights. Scant reference can be found in the independence sub-Saharan Africa constitutions to second-generation rights. The context in which the constitution making processes in both English and French-speaking Africa developed and, notably, the political and cultural dependence of African élites on the colonial powers provides an explanation for this. The constitutions of English-speaking Africa were adopted before the colonies became independent sovereign states. Moreover, the need to obtain international legitimacy constituted a core concern of African independentist leaders, which certainly influenced their attitude vis-à-vis constitutional models. An interaction of colonial (or neo-colonial) interests and African concerns accompanied by a legal and political "acculturation" of the African élites, made the transplant of the liberal human rights model an easy, but not well thought-out choice for African leaders, who had the difficult task to rule sovereign states after having fought for independence. Moreover, the fact that European colonial powers largely determined what kind of protection of human rights could be inserted in sub-Saharan African constitutions also resulted from the fact that African leaders at the time had not devoted much time to the issue. During their struggle against colonialism, African nationalist leaders focused only on the right to self-determination and the principle of equality in order to denounce the colonial domination, the practice of racial discrimination and all the abuses committed by the colonial administration. They condemned colonialism as being contrary to the UN Charter,⁸ the

7 R. Vasak, "The European Convention of Human Rights Beyond the Frontiers of Europe", 12 *International and Comparative Law Quarterly*, 1963, p. 1218.

8 June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force 24th October 1945.

Universal Declaration of Human Rights⁹ and the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁰ The conferences held in the late 1950s and early 1960s, which led to the establishment of the Organisation of African Unity in 1963, can be seen as representative of the African attitude at that time since they were attended by delegates of the then few independent African states and by representatives of African nationalist parties. The first two conferences, which took place in Accra in 1958 and Addis Ababa in 1960, underlined the value of the Universal Declaration of Human Rights, but only with the goal of promoting independence claims and censuring the practice of racial discrimination. The question of human rights was discussed in the context of future independent African constitutional systems for the first time at the Conference on the Rule of Law held in Lagos in 1961, which was organised on the initiative of the International Commission of Jurists (ICJ) and was attended by African lawyers. The Conference not only adhered unanimously to the principles of the Universal Declaration but also adopted a resolution known as the 'Law of Lagos' which invited "the African governments to study the possibility of adopting an African Convention on Human Rights", and also stated that "the fundamental rights, especially the right to personal liberty, should be entrenched in the constitutions of all countries and that such personal liberty should not in peace time be restricted without trial in a Court of Law".¹¹ However, the resolution was not representative of the African political leaders' view on this matter. Two years later the Organisation of African Unity was created and in the preamble of its Charter a reference was made to the Universal Declaration. However, the suggestions of the Conference of Lagos were not taken into account and specific rights were not expressly mentioned. Therefore, by the 1960s, we can already see a diversity of attitudes and concerns vis-à-vis human rights. The views of the political leadership prevailed. However, the position of civil society, in this case represented by the legal community, was not ineffective. Even though its work was not very visible outside Africa for many years, it nurtured the regional discourse on human rights, which also resulted in the African Charter on Human and People's Rights.

9 GA Resolution 217 A (III) of 10 December 1948.

10 Rome, 4th November 1950.

11 International Commission of Jurists, *African Conference on the Rule of Law: A Report on the Proceedings of the Conference, Lagos, Nigeria, 3rd-7th January 1961*, p. 9.

CHAPTER 1: The 'Transplant' of the Liberal Model of Human Rights in Anglophone Africa

In the framework of this thesis, the expression Anglophone or English-speaking countries encompasses countries which were subjected to British colonisation and achieved their independence in the decolonisation wave which took place between the late 1950s and 1960s. They include Gambia, Sierra Leone, Ghana and Nigeria in West Africa; Kenya, Malawi, Tanganyika, Uganda and Zambia in East and Central Africa; and Lesotho, Botswana, Swaziland and Mauritius in Southern Africa. They achieved their independence respectively in 1965, 1961, 1957, 1960, 1963, 1964, 1961,¹² 1962, 1964, 1966, 1966, 1968 and 1968. All of these countries went through constitutional developments, which, despite some variations, have followed a common political and constitutional pattern. Upon independence all of them had constitutions written before becoming sovereign states. Moreover, they all had a Westminster-style form of government and, with the exception of Ghana and Tanganyika, they all had bills of rights in their constitutions.

1.1 The Constitution-Making Processes

The three main features of the constitutional processes, which yielded the independence constitutions, were firstly the major role of the colonial power, secondly the lack of popular involvement, and finally the interdependence of the constitutional processes with the independence processes. The British Crown adopted constitutions before granting independence to the colonies during a process in which the main actors were the Colonial Office and the representatives of the African political parties.¹³

The constitution-making process took place in two distinct phases. Firstly the delegates of the African nationalist parties negotiated the constitutional texts during conferences which were attended by the Secretary of State for the Colonies, along with his advisers, as representatives of the British government. The objective of these Conferences was to elaborate upon proposals for the constitutions of the countries which would soon achieve

¹² Tanganyika, along with Zanzibar, gave birth to Tanzania in 1964 and achieved its independence in 1963.

¹³ The British territories already had constitutions, which were drafted by the Colonial Office and adopted by the British Crown. It should be noted, however, that with the enhancement of the nationalist movements and African political parties, some of these constitutions were written with African contribution. For example, the 1950 Constitution of Tanganyika was drafted by the Colonial Office, but was preceded by the formulation of proposals by a Commission which included representatives of the national parties present in the Legislative Council. In the case of the 1950 Constitution of the Gold Coast, proposals were formulated by a Commission composed only of African representatives. The 1951 Nigerian Constitution followed consultations held at village, division, provincial, regional and national levels; see P.-F. Gonidec *Les droits africains. Évolution et sources*, LGDJ, Paris, 1976, pp. 83-85.

their independence. To this end, reports were written and subsequently transmitted to the Colonial Office, which then drafted the texts of the new constitutions. The latter were then formally adopted by the British Crown in the Privy Council upon government advice, usually in the form of subsidiary legislation of the "Orders in Council", which implied that the British Parliament was merely informed. The local legislatures of the African colonies were also excluded from the constitution-making process. They were only made aware of the constitutional texts that were negotiated between the British representatives and the African political leaders after they had already been drafted and, therefore, were incapable of being changed.¹⁴

The constitutions of the former British colonies can, therefore, be seen as "*de sortes de pactes conclus entre la puissance coloniale et les dirigeants politiques africaines*",¹⁵ in which the colonial voice was predominant. This predominance was often enhanced by specific political circumstances. This occurred when disagreement arose among the African nationalist parties, which allowed the Colonial Office to play the role of arbiter and consequently, to make the final decisions, as in the case of Kenya.¹⁶ The superior position of the colonial power was a general feature of the constitutional processes in Anglophone Africa at the time of decolonisation, and it manifested itself independently of contemporary conditions. This was due to the link between the adoption of the constitutions and the achievement of independence. In other words, the fact that the constitutions were negotiated before the attainment of independence left the African representation at the conferences in a weaker position and with less freedom to disagree, as agreement on the constitution was, in substance, a pre-requisite to obtaining independence from Britain. Therefore, on some issues, the African position on some issues was influenced by their eagerness to obtain independence and the fear of this process being delayed through disagreement with the UK. This was put extremely clearly by one of the African protagonists of that period, the future President of Ghana, Nkrumah, who denounced the Constitution of Ghana of 1957 as an "affront" to the sovereignty of Ghanaians, since the provisions of the constitution "were the entrenched clauses which the British government insisted upon writing into the constitution as a condition to our accession to independence".¹⁷

¹⁴ Sierra Leone, for example, became independent on 27th April 1961 and on 20th March 1961 the local legislature had still not read the constitutional text.

¹⁵ Gonidec, *Les Droits*, cit., p. 84.

¹⁶ See Y.P. Ghai and J.P.W.B. McAuslan, *Public Law and Political Change in Kenya*, Oxford University Press, Nairobi, 1970, pp. 177-178.

¹⁷ K. Nkrumah, *Africa Must Unite*, Panaf Books, London, 1963, p. 59.

The preceding overview shows that the constitution-making processes, which endowed Anglophone Africa with its first independence constitutions, were not occasions of real debate and reflection on the type of institutions which would have been most suitable for the new African states. Constitutions were the product of decisions taken by the colonial power with African political leaders, neither of whom were greatly concerned with the adoption of a constitution adequate to the needs and specificities of Africa countries. The former viewed the constitutions as a means of retaining special links with the ex-colonies, to ensure the coexistence of all the groups, interests and regions which would compose the new states and above all, to provide the European minorities with sufficient guarantees at the end of the colonial rule.¹⁸ With regard to the latter, the bill of right was conceived as a key instrument for their protection.

1.2 The Bills of Rights

With the exception of the Constitutions of Ghana and Tanganyika, all of the independence constitutions in English-speaking Africa contained a chapter, which was extremely detailed both in the enumeration of the rights protected and in the specification of the possible limitations, as well as the means of enforcement. The first constitution in Anglophone Africa to include a Bill of Rights was the Nigerian Constitution, which provided a model for the texts that were adopted afterwards. The Bill of Rights of Sierra Leone,¹⁹ Uganda,²⁰ Kenya,²¹ Malawi, Zambia,²² Botswana, Lesotho and Swaziland are defined as neo-Nigerian Bills of Rights. It is interesting to observe that the Nigerian Bill of Rights represented a deep change of attitude for Britain with respect to the issue of human rights protection. Traditionally, Britain has always displayed distrust towards the formal declaration of rights, and had also confirmed this attitude during the drafting of the constitution of Ghana, which preceded that of Nigeria. In fact, at the time of the adoption of the Constitution of Ghana in 1957, the UK decided against the drafting of a Bill of Rights, although both the Ghanaian government led by Dr. Nkrumah and its opponents were in favour of its inclusion in the constitution.²³

¹⁸ See G. Fisher, "La decolonisation et le rôle des constitutions", in *Annuaire français de droit international*, 1962, p. 805-806 and p. 822.

¹⁹ On the Constitution of Sierra Leone, see T.O. Elias, *Ghana and Sierra Leone: the Development of their Laws and Constitutions*, Stevens & Sons, London, 1962; T. Bankole, *The Constitutional History and Law of Sierra Leone (1961-1995)*, University Press of America, Lanham, 1996.

²⁰ See H.F. Morris and J. Read, *Uganda: the Development of its Laws and Constitution*, Stevens & Sons, London, 1966.

²¹ Y.P. Ghai and J.P.W.B. McAuslan, *Public Law*, cit.

²² L. Zimba, *The Zambian Bill of Rights*, East African Publishing House, Lusaka, 1984.

²³ See F.A.R. Bernion, *The Constitutional Law of Ghana*, Butterworths, London, 1962, pp. 58-59; G. Bing, *Reap*

Consequently, the independence constitution of Ghana of 1957 did not include a Bill of Rights, but merely made a brief reference to the freedom of conscience and religion, and prohibited racially discriminatory laws as well as property expropriation, except in pursuit of a law requiring the payment of adequate compensation and providing for a right to access to the courts for the determination of the right to compensation.

The Nigerian Constitution thus constituted a major turning point in the constitutional building of Anglophone Africa. The history of the adoption of the Nigerian²⁴ and neo-Nigerian Bills of rights is extremely interesting because it allows us to assess African position on human rights, which in turn, enables us to evaluate the factors which determined the ineffectiveness of the constitutional provisions on fundamental rights.

The first constitutional conference for the drafting of the Nigerian Constitution was held in London in May and June 1957. At this time, Nigeria was divided into three regions (Northern, Eastern and Western Nigeria), whose governments were dominated by political parties representing the major tribal and linguistic groups of the regions concerned. Tensions were strong among the parties in power on one side and the tribal and linguistic minorities and parties governing in the other regions on the other side. In order to solve the problem of minorities, the party ruling in the Western region, the Action Group, presented two proposals, namely, the creation of new regions and the inclusion in the constitution of specific provisions guaranteeing a set of fundamental rights. The conference welcomed in principle the idea of the constitutional declaration of rights and postponed the decision on new regions because of both the opposition of the party which ruled the Northern region and because of the fear of the British that the country would disintegrate.²⁵ It was clear that the British government would have delayed the concession of independence if the creation of new regions was insisted upon. For this reason, the Action Group abandoned the defence of that idea. With the purpose of assessing the best solution for the problem of the minorities, the Conference agreed on the creation of a Commission of Enquiry was mandated to "ascertain the facts about the fears of

the Whirlwind, MacGibbon and Kee, London, 1968, Appendix. The Ghanaian government adopted a White Paper which was recommended to the British government after receiving the approval by the Assembly. This White Paper contained a draft constitution, which included seven articles for the protection of fundamental rights mainly drawn from the Constitutions of India and the Irish Free State. However, this draft was rejected by the United Kingdom.

²⁴ On the Nigerian Bill of Rights, see S.A. De Smith, *The New Commonwealth and its Constitutions* Stevens & Sons, London, 1964; S.A. De Smith, "Fundamental Rights in the New Commonwealth-II", 10 *International and Comparative Law Quarterly*, 1962, p. 215; T.O. Elias, *Nigeria, the Development of their Laws and Constitutions*, Stevens & Sons, London, 1962; R.K. Hahn, "The British Influence on the Initiation and Introduction of Commonwealth Bills of rights", 16 *Journal of Commonwealth*, 1988, p. 54; C. Heyns, "African Human Rights Law and the European Convention", 2 *South African Journal on Human Rights*, 1995, p. 252; Vasak, *The European Convention*, cit., p. 1206.

²⁵ See De Smith, *The New Commonwealth*, cit., pp. 178-179.

minorities in any part of Nigeria and to propose means of allaying those fears, whether well or ill-founded".²⁶ This Commission, which was presided over by Sir Henry Willink, proposed that provisions on fundamental rights should be included in the constitution and submitted a text entirely framed on the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, with one or two provisions drawn from the Constitutions of Malaysia and Pakistan. The Commission motivated its proposals as follows:

"[p]rovisions of this kind in the Constitution are difficult to enforce and sometimes difficult to interpret. Nevertheless, we think they should be inserted. Their presence defines beliefs widespread among democratic countries and provides a standard to which an appeal may be made by those whose rights are infringed. A government determined to abandon democratic courses will find ways of violating them but they are of great value in preventing a steady deterioration in standards of freedom and the unobtrusive encroachment of a government on individual rights. We have therefore considered that provisions might suitably be inserted in the Constitution and have given particular attention to the Convention on Human Rights to which, we understand, Her Majesty's Government has adhered on behalf of the Nigerian Government".²⁷

On the basis of this proposal, the British Colonial Secretary formulated a draft text which was accepted at the Constitutional Conference held in London in September and October 1958. The Nigerian Constitution of 1st October 1960, thus, included a bill of rights in chapter three of the second part under the title of "Fundamental Rights".²⁸

According to Anthony Rushford, a former Foreign and Commonwealth Office official who had a role in the drafting of the Nigerian Constitution, there were three main reasons for using the European Convention as a model. Firstly, this was in line with the method used by the British in the drafting of legal texts, secondly with the Nigerian preference for the enumeration of guarantees and corresponding limitations, and, finally, with the specific desire of Nigerian politicians and administrators to know the exact limits on their activities.²⁹ Another determining factor was the fact that Britain had already formally applied the

²⁶ Quoted in Vasak, *The European Convention*, cit., p. 1216.

²⁷ Cmnd. 505 (1958), p. 97.

²⁸ At the request of the Nigerian political leaders, the chapter on human rights was promulgated before independence for the federal elections which took place on 18th December 1959.

²⁹ Anthony Rushford, interview, 9th May 1985 mentioned in Hahn, *The British Influence*, cit., p. 57.

European Convention in its African territories since 1953,³⁰ on the basis of the "colonial clause" contained in Article 63 of the Convention which provides that "[a]ny State may ... declare ... that the present Convention shall extend to all or any of the territories for whose international relations it is responsible".³¹ Therefore, the use of the European Convention was considered a natural step, especially in light of the absence of a written Constitution in Britain.

All of the constitutions adopted after Nigeria followed this model. The only exception was the 1961 Constitution of Tanganyika which did not have a Bill of Rights because of the firm opposition of Nyerere's government. The opposition of Tanganyika anticipated some of the questions pertaining to the adequacy of a liberal Bill of Rights for sub-Saharan Africa, which emerged after a few years in the whole region. The reasons for the government's opposition were not all made public, but scholars have pointed out that one motivation may have been the fact that at that time, most of the judges of the superior courts who should have enforced the constitutional guarantees were non-Africans.³² Furthermore, the possibility that citizens would claim their rights may have been viewed by the government as a potential hindrance to the economic development of the country.³³ Finally, the constitutional recognition of rights and freedoms was seen as a possible source of conflict between the different branches of government. The then Prime Minister, Rashid Kawawa, explained this in the following terms: "A Bill of Rights merely invites conflict between the executive and the judiciary; that is the kind of luxury which we could hardly afford to entertain".³⁴ A

³⁰ The Convention was applied in Basutoland, Bechaland, Gambia, Gold Coast, Kenya, Mauritius, Nigeria, Northern Rhodesia, Nyasaland, Seychelles, Sierra Leone, Somaliland, Swaziland, Tanganyika, Uganda, Zanzibar. It was not applied in Southern Rhodesia likely since it had the status of self-governing colony at that time.

³¹ In fact, the extension of the European Convention to the colonies did not improve the human rights situation of Africans. Clause 3 of Article 63 added that, upon the declaration of the extension, "the provisions of this Convention shall be applied in such territories with due regard ... to local requirements", which means that the colonial power was entitled to exclude the application of some rights on the grounds of specific local situations, or rather, as it was pointed out in the Consultative Assembly, according to "political requirements"; see Vasak, *The European*, cit., p. 1209. This clause gave Britain a legal basis for upholding its practices and laws infringing upon the rights and freedoms recognised in the Convention. Moreover, the UK had not accepted the right of individual petition or the compulsory jurisdiction of the European Court of Human Rights. The UK did not even fulfil the obligation provided by Article 15 of the European Convention to report derogations to the Council of Europe in case of declaration of states of emergencies. The only reported case in which Article 63 was invoked occurred when the African National Congress of Nyasaland asked Island to present an inter-state complaint against the UK for the detention of their leader, Dr. Banda. He was released before a complaint was filed.

³² See De Smith, *The New Commonwealth*, cit., p. 213. De Smith reported that according to the survey carried out by the Denning Committee on Legal Education for Students from Africa in December 1960, out of the hundred lawyers present in Tanganyika only one was African. Early in 1963 the number increased only to five.

³³ C.M. Peter, "Five Years of Bill of Rights in Tanzania: Drawing a Balance-Sheet", 18 *Eastern Africa Law Review*, 1992, p. 149.

³⁴ Parl. Deb., National Assembly, 1st Sess., 3rd Mtg., 1088 (June 28, 1962), quoted in De Smith, *The New Commonwealth*, cit., p. 214.

parliamentary democracy and an independent judiciary were conceived as sufficient guarantees for individual rights and freedoms. The preamble to the constitution of Tanganyika, indeed, stated that human rights "are best maintained in a democratic society where the government is responsible to a freely elected but sovereign Parliament representative of the people, and where the courts of law are independent and impartial". The absence of large ethnic groups in the country facilitated the success of this position.

In the same year when Tanganyika refused to adopt a Bill of Rights, all of the remaining territories under British rule agreed upon its inclusion in their constitutions. The question is, however, whether these Bills of Rights were the product of an African request, or at least of an agreement deriving from a firm belief in their necessity, or whether they were the result of a British imposition. While the British standpoint on the matter of the constitutionalisation of fundamental rights is clear, the African view is problematic. On this subject, the testimonies are often conflicting and there is scant attention given to this issue in the literature. What results from the existing literature is that a demand for the constitutional entrenchment of human rights rarely came from the African side. The only exception to this was the case of Nigeria, however in this instance, the request came from the Action Group party alone, and was directed towards a specific aim, that is to obtain guarantees that the minorities in the Northern Region could freely exert their political opposition against the traditionalist, Muslim party, the Northern People's Congress (NPC). The Action Group was not concerned with the protection of the rights of the individual, but rather with that of the minorities; in fact, it was not satisfied with the British drafting of the Bill of Rights since it was formulated in individualistic terms. Moreover, in 1958, the Willink Commission reported that, during the investigations carried out to find a solution to the minority problem, it was discovered that there was "little enthusiasm for the entrenchment of fundamental rights as a safeguard for minorities".³⁵

During the debates for the Republican Constitution of 1966, Dr. Banda, the President of Malawi, stated (and this statement was confirmed by the member of the opposition) that he had declared his reservations to the inclusion of a Bill of Rights in the independence

³⁵ See *ibidem*, p. 178. With regard to Northern Rhodesia it can be of some interest to remember what the Colonial Secretary said: "I think the conference may ... now turn its attention to safeguards, both for the individual and for minority communities. The latter is perhaps of particular importance in a territory which is not yet fully developed and a society which is not homogeneous. Whereas in a developed homogenous country such as Britain, the protection of minority interests is maintained by certain recognised and traditional conventions, in underdeveloped and mixed communities special provisions are needed for this purpose, and it has been usual in Commonwealth countries to enact by law safeguards", Cmnd. 1295, p. 4. See also Zimba, *The Zambian*, cit., p. 85.

constitution and had even made it clear to Mr. Butler, the Head of the Central African Office, that the constitution would probably have to be amended soon after its adoption.³⁶ He had only surrendered to British will in order to avoid delay in the achievement of independence. Apparently, however, constitutional guarantees were encouraged also by the minority United Federal Party.³⁷

In the following section, the case of Northern Rhodesia shall be described in further detail as an example of a country in which the issue of the guarantee of individual human rights appears to have been really an integral part of the political programme of an African national movement.³⁸ There, the notion of human rights was not only used by the United National Independence Party (UNIP) to give a legal and theoretical foundation to the claim of emancipation from the colonial dominance but also as a project for the future.

The commitment of UNIP seems, however, to be an exception in the overall framework of English-speaking Africa, where generally the entrenchment of Bills of Rights in the constitutions was more the outcome of a British concern about defending the interests of the Europeans who would remain in the former colonies after the end of colonial rule. This was certainly the case for Kenya, Nyasaland and Northern Rhodesia. The Governor of Kenya stated during the negotiations for the constitution: "I have seen the vital contributions that Europeans and Asians have made, and are making, to the economy of Kenya, and I have seen with admiration the work that has been done by a devoted public service. Kenya needs the brains, devotion, and capital of all its peoples. This calls for a society and an economy without discrimination of race, creed or colour, where individual rights are firmly recognised and maintained".³⁹

Despite the clear situation in some countries, the African position on the Bills of Rights appears controversial in many others. Thus, apart from the above-mentioned cases of clear opposition (i.e. Nyerere in Tanganyika and Banda in Malawi) and of demand (i.e. the Action Group in Nigeria) or commitment (i.e. UNIP in Northern Rhodesia), it is difficult to determine whether the bills of rights were perceived elsewhere by the African side as

It is interesting to observe that Britain was so convinced about the usefulness of Bills of Rights that it urged for their inclusion even where, for example in Sierra Leone, there was no serious minorities problem and, allegedly, even no national demand in that direction; see A.B. Timbo, *Human Rights in Sierra Leone: A Comparative Study*, University of London, Ph.D. thesis, 1979, p. 55 quoted in Hahn, *The British*, cit., p. 59.

³⁶ Official Report of the Proceedings of the Parliament of Malawi, 29 October 1964, pp. 222-224 and p. 227, quoted in Hahn, *The British*, cit., p. 61.

³⁷ See S. Roberts, "The Republican Constitution of Malawi", *Public Law*, 1966, p. 321 and Report of the Nyasaland Constitutional Conference, Cmnd. 1887 (1962), p. 7.

³⁸ Zimba, *The Zambian*, cit., p. 86.

³⁹ Cmnd. 1700 (1962), p. 8, quoted in Hahn, *The British*, cit., p. 66.

necessary or 'imposed' by Britain (by 'imposed' is meant that African governments were compelled or strongly urged by Britain to accept the constitutional protection of rights in order to obtain independence). The testimonies given by those involved in the constitution-making processes on the British side are rather ambiguous. Most admitted that Britain suggested the formulation of constitutional guarantees but denied that there was any imposition. As Sir Kenneth Roberts-Wray, a former legal adviser to the Secretary of State for the Colonies and the Secretary of State for Commonwealth Relations, stated: "I am not in a position to affirm that persuasion has never been necessary, or indeed to deny it, but it can be easily demonstrated that the suggestion is not in keeping with the facts in some cases".⁴⁰ This testimony is confirmed by another former legal adviser who has stressed the existence of an African demand: "[o]nce Nigeria had a constitution containing a code of Fundamental Rights, the political leaders of other territories (apart from Tanganyika) came to the conference table expecting to be offered, and prepared to accept, a constitution containing such a code and discussion in conference was directed to the details of the code rather than to the general principle".⁴¹ However, the Secretary General of the Commonwealth has defined the insertion of Bills of Rights in independence constitutions as "a parting gift" which in nearly every case was "one selected for the occasion by the fledging state itself",⁴² and Anthony Rushford admitted that "there was UK prompting" but added that there was no imposition.⁴³ While Ian McLeod, the Secretary of State for Colonies reported to the Parliament that "[i]t was very much the desire of the Nigerian leaders themselves that there should be such a code",⁴⁴ the Willink Commission explained that there was no widespread demand. Only some of the Christian groups had called for their inclusion.

In light of the subsequent developments and also of the overall constitutional experience of decolonisation, it seems that the judgement formulated by James Read on Anglophone constitutions can be used with specific reference to the Bills of Rights, in other words, they represented a "compromise solution provisionally accepted in order to expedite independence".⁴⁵ There was no coercion, however African leaders were so eager for

⁴⁰ K. Roberts-Wray, "Human Rights in the Commonwealth", 17 *International and Comparative Law Quarterly*, 1968, p. 917.

⁴¹ Sir James McPetries, Notes, quoted in Hahn, *The British*, cit., pp. 54-55.

⁴² S.S. Ramphael, Fundamental Rights – The Need for a New Jurisprudence, 8 *Caribbean Quarterly* 1962, p. 142.

⁴³ Interview, 9 May 1985, quoted in Hahn, *The British*, cit., p. 58.

⁴⁴ 625 H.C. Debates, 5s., 1793, quoted in *ibidem*, p. 57.

⁴⁵ J. Read, "Bills of Rights in 'The Third World': Some Commonwealth Experiences", 6 *Verfassung und Recht in Übersee*, 1973, p. 27. The same author has spoken of an "encouragement" from the UK to adopt enforceable Bills of Rights upon independence "as part of their constitutional settlement"; see J. Read, "Human Rights

independence that they did not seek long discussions on the content of the constitutions, and allowed the British to write a bill of rights according to a model only here and there adapted to local circumstances.⁴⁶

An analysis of the contents of the Bills of Rights will now be provided. As stated above, the Nigerian Bill of Rights represented the model in English-speaking Africa and having been modelled on the European Convention, it contained a clear liberal imprint. What is interesting is that it was even more radically liberal than the European Convention. Thus, the Nigerian Bill of Rights did not contain any reference to the so-called second-generation rights. Although it mentioned education, it did not deal with it in terms of a positive right. By repeating an article of the Pakistani Constitution of 1956, it merely prohibited the imposition of religious instruction or observances on persons of other religions, and guaranteed religious communities the right to provide religious instruction for their members in schools which they maintained. The European Convention, on the other hand, albeit extremely sparing with the matter of second-generation rights, protects the right to marry and to found a family (Article 12) and its Protocol⁴⁷ recognises the right to education and that the State shall respect the religious and philosophical convictions of parents in the provision of teaching. As for the other rights, the Nigerian and neo-Nigerian Bills of Rights follow provisions laid down in the European Convention.

The rights protected in the Nigerian Constitution included the right to life (Article 17; cf. Article 2 of the Convention); to protection against torture and inhuman or degrading punishment or treatment (Article 18; cf. Article 3 of the Conv.); to liberty and security of the person (Article 20; cf. 5 of the Conv.); to the proper administration of justice (Article 21; cf. Article 6 of the Conv.; furthermore Article 21(7) forbids the retroactive application of criminal legislation similar to Article 7 of the Conv.); to respect for private and family life, home and correspondence (Article 22; cf. Article 8 of the Conv.); to freedom of thought, conscience and religion (Article 23; cf. Article 9 of the Conv.); to freedom of expression (Article 24; cf. Article 10 of the Conv.); to freedom of peaceful assembly and association (Article 25; cf. Article 11 of the Conv.); of movement (Article 26);⁴⁸ to protection against

Protection in Municipal Law", in C.F. Forsyth and J.E. Schiller (eds.), *Human Rights: the Capetown Conference*, Juta, Capetown, 1979, p. 60.

⁴⁶ Sir Kenneth Roberts-Wray wrote that the chapters of fundamental rights "were apparently prepared more with scissors and paste than with pen and pencil", in K. Roberts-Wray, *Human Rights*, cit., p. 908.

⁴⁷ Paris, 20 March 1952.

⁴⁸ This right is not envisaged in the Convention. It is recognised in Article 2 of Protocol No. 4 of 16 November 1963.

discrimination (Article 27; cf. Article 14 of the Conv.);⁴⁹ to compensation in the event of expropriation (Article 30).

The Anglophone Bills of Rights are also strictly liberal in the wide protection given to the right to property, which, conversely, is absent from the European Convention, and included in Article 1 of the Protocol.⁵⁰ The Nigerian and the neo-Nigerian Bills of Rights provided that adequate compensation was to be envisaged by law in the case of compulsory expropriation, and, moreover they indicated the kinds of laws which were not covered and entrusted the determination of the right to compensation to the jurisdiction of the High Court.

The liberal inspiration of the Bill of Rights of English-speaking Africa is also confirmed by the lack of any mention of citizens' duties, even though they are referred to, albeit indirectly, in the European Convention. Article 10(2) states that "[t]he exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation of the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and the impartiality of the judiciary".

Finally, all of the Anglophone Bills of rights provided for judicial protection of the recognized rights. In Nigeria, for example, any person was entitled to bring an action before the High Court alleging a violation of a right guaranteed by the constitution. The Court, in turn, was empowered to give any orders to guarantee the enforcement of the right concerned.⁵¹ The decision of the High Court could then be appealed before the Federal Supreme Court,⁵² with the final decision resting with the judicial committee of the Queen's Privy Council.⁵³

However, the scope of some of the specific rights was reduced, by enabling public authorities to take restrictive measures in the interest of defence, public safety, public order, public morality or public health provided that these measures were established by law and

⁴⁹ The non-discrimination clause is more detailed in the Nigerian constitution than in the European Convention and is not confined to the rights and freedoms expressly envisaged in the document as it is in the European Convention. However, the Nigerian Constitution does not include sex as a possible ground for discrimination and it prohibits discrimination only with regard to Nigerian citizens while the European Convention extends it to everyone independently of their nationality.

⁵⁰ Article 1 merely states that "[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions. No one should be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law".

⁵¹ Article 31.

⁵² Article 110 s.2 (d).

⁵³ Article 114 s.1 (c).

“reasonably justifiable in a democratic society” (Nigerian Constitution)⁵⁴ or, with a more restricted formulation, “reasonably required” (as in the Constitutions of Sierra Leone, Uganda, Kenya, Nyasaland). In the European Convention, the condition for the adoption of restrictive measures is narrower than the latter. The measures must be “necessary in a democratic society”⁵⁵ and not simply “reasonably justifiable” or “required”. In addition to this, English-speaking African vested the power to adopt emergency measures in the President.⁵⁶

These provisions played an important role in the poor human rights record of the states of English-speaking Africa. As it will be shown in the next section, they constituted the legal basis for the widespread suppression of human rights, which affected sub-Saharan Africa since independence.

A final consideration must be devoted to the procedure of the amendment of the Bills of Rights which conditions the actual safeguarding of fundamental rights and freedoms. The Nigerian Constitution, in allegiance to its liberal inspiration, envisaged a procedure which in theory made it difficult to amend the Bill of Rights. Its amendment required the approval of at least two-thirds of the members of each House at second and third readings, followed by the additional approval of each legislative House of at least two regions.⁵⁷ In fact, the presence of parties which enjoyed a secure majority in Nigeria and, in other countries, of one dominant party made the revision of the Bill of Rights easier than it might have appeared.

1.3 Zambia: the 1964 Constitution

The State of Zambia acquired independence from Britain on 24th October 1964 when Northern Rhodesia⁵⁸ became the independent Republic of Zambia.⁵⁹ The independence Constitution of 1964 entered into force the same day and was included in the Schedule II of the Zambia Independence Order promulgated by Her Majesty in Council under the provisions of the 1890 Foreign Jurisdiction Act. Only one year before it had achieved self-government.

⁵⁴ Articles 22-26.

⁵⁵ See Articles 8-11. On the measures of derogation in Anglophone constitutions, see De Smith, *The New Commonwealth*, cit., p. 188; B.O. Nwabueze, *Constitutionalism in the Emergent States*, C. Hurst, London, 1973, p. 44-47; Vasak, *The European*, cit., 1219-1220.

⁵⁶ Article 28.

⁵⁷ Article 114 ss. 4(1), (2).

⁵⁸ From 1890 to 1924, Northern Rhodesia was administered by the British South Africa Company led by John Cecil Rhodes and until 1911, was divided into north-eastern Rhodesia and north-western Rhodesia. In 1924, Northern Rhodesia passed under the direct administration of the British Government. From 1953, Northern Rhodesia was federated with Southern Rhodesia (today Zimbabwe) and Nyasaland (today Malawi). The Federation was dissolved in 1963.

⁵⁹ See the *Zambia Independence Act* and the *Zambia Independence Order* of 1964.

The Prime Minister was Kenneth Kaunda, leader of UNIP, which obtained a huge victory in the 1962 elections.

The Constitution provided a President, head of the executive, which appointed Ministers from among members of the National Assembly. These formed a Cabinet, which was responsible before the President. The latter was also Commander-in Chief of the armed forces. Legislative function was vested exclusively in the Parliament, which was composed by the President, seventy-five elected members and up to five members nominated by the President. The President had the power of veto over legislation and, if a bill was re-passed by a two-thirds majority by the Parliament, he could still avoid the enactment of the law by dissolving the Assembly. The Judiciary will be discussed in more detail below.

1.3.1 The Constitution-Making Process

As explained above, similar to the other constitutions of former British colonies, the 1964 Constitution was written before Northern Rhodesia became the independent Republic of Zambia. The British Government and the representatives of the Zambian nationalist parties, the United National Independent Party (UNIP) and the African National Party (ANC) agreed upon it during the conference in which the independence of Northern Rhodesia was negotiated. The Northern Rhodesia Independence Conference was held from 5th to 9th May in London under the chairmanship of Mr. Duncan Sandys, Secretary of State for Commonwealth Relations and for the Colonies. The British Delegation, the Governor of Northern Rhodesia, the Northern Rhodesia Government, the Northern Rhodesia Government Officials, the representatives of Zambian parties attended the conference. On that occasion, it was decided that the provisions of the independence constitution relating to human rights should follow the model of Chapter One of the Northern Rhodesia Constitution of 1963 establishing self-government,⁶⁰ subject to some modifications. The self-government Constitution included a Bill of Rights modelled on the European Convention.

The British favoured the inclusion of the bills of rights due to concerns for the protection of the various African and non-African minority groups in Northern Rhodesia. This

⁶⁰ Northern Rhodesia Constitution 1963, Schedule to the Northern Rhodesia (Constitution) Order in Council 1963, Chapter 1. It entered into force on 3rd January 1964. The inclusion of a Bill of Rights in the constitution followed the appointment of a Commission in 1959 chaired by Viscount Monckton with the task of formulating recommendation on the review of the Constitution of the Federation of Rhodesia and Nyasaland. This Commission, which had only two African members (one from Northern Rhodesia and one from Nyasaland), recommended the inclusion of human rights provisions in response to the complaints of racial discrimination to the advantage of Europeans as well as specific demands for the guarantee of fundamental human rights; see Report of the Advisory Commission on the Review of the Constitutions of Rhodesia and Nyasaland, Cmnd. 1148, 1960 (the Monckton Report).

consisted of seventy-three African ethnic groups, the most numerous of which were the Lozi, the Bemba and the Ngoni, and the communities of Europeans and Asians who had come to Zambia attracted by the business opportunities offered by the mining industry. The British viewed a bill of rights as a bastion in the defence of minorities, whose rights might be threatened by a government controlled by a single party. The idea of the bill of rights also found the support of the representatives of the chiefs of the Zambian ethnic groups who favoured it as a guarantee for the groups which might not be represented in the government. The UNIP was equally favourable to the idea of a bill of rights, who had adopted a document entitled "UNIP Declaration of Fundamental Human Rights" in 1960, in which it was asserted that "[t]he constitution shall contain fundamental safeguards guaranteeing the freedom of the individual and providing against abuses of power by the Executive". The Declaration added that this safeguard was addressed not only to minority groups but also to all the people of the country. Finally, it defined these safeguards as "an expression of UNIP's belief in the dignity and freedom of the individual, and in the principles of justice and charity to all".⁶¹ The document culminated with a list of rights and freedoms to be embodied in the constitution and these were all drawn from the Universal Declaration of Human Rights. They included the right to life, liberty and security of person; equality before the law; freedom from arbitrary arrest, detention or exile save in accordance with law; freedom from interference of one's privacy, family, home, or correspondence; freedom of peaceful assembly and association including the right to form political parties and trade unions, freedom of expression; freedom of thought, conscience and religion; right to property; protection from discrimination on the grounds of race, colour or sex ; right to vote and rights to due process of law. The only social and economic rights mentioned were the right to an adequate standard of living including good health for oneself and the family, the right to education and the duty of the state to safeguard the interest of the weaker members of the community. In the pre-independence Constitution of UNIP, there is also a commitment to the realisation of civil and political rights. The position taken on this issue of social and economic rights is more extensive. The UNIP constitution stated that the aims of the Party were "to abolish all forms of discrimination and segregation based on race, colour, tribe, clan and creed" (para. c); "to ensure that freedom of speech and freedom of the Press shall not be infringed, and that the people of Northern Rhodesia shall be free to think, speak, write, assemble, work and trade in accordance with the laws of the country" (para. j); "to secure for the people of Northern

⁶¹ *UNIP Declaration of Fundamental Human Rights*, October 1960 published in Appendix II in D.C. Mulford, *The Northern Rhodesia General Election*, Oxford University Press, Nairobi, 1962, pp. 191-192.

Rhodesia freedom of worship, according to conscience ” (para. k); “ to achieve African democratic socialism for Northern Rhodesia, raise the standard of living of the people ” (para. l); “ to secure the most equitable production and distribution of the wealth of the country in the best interests of the people of Northern Rhodesia ” (para. m); “ to protect working people by legislation for living minimum wages for skilled and unskilled labour, in addition humanising the conditions of labour and guaranteeing social security for the people of Northern Rhodesia ” (para. p); “ to facilitate educational grants and scholarships to any deserving men and women for study ” (para. r); “ to ensure that free health services shall be provided by the central and local governments for all the people of Northern Rhodesia who are in need of such services ” (para. s).⁶²

In the UNIP post-independence constitution, the place of human rights was weaker, despite confirmation that one of the objectives is “ to ensure that freedom of speech, worship and freedom of the Press shall not be infringed and that the people of Zambia shall be free to think, speak, write, assemble, work and trade in accordance with the laws of the country ”.⁶³ Nevertheless, the achievement of “ African democratic socialism ” in the new constitution was the primary goal: “ [t]o achieve African democratic socialism, raise the standard of living of the people and generally strive to make the people of Zambia contented and happy ”.⁶⁴ This is linked to the objective “ to co-operate with any movement or organisation for the improvement of workers’ conditions and to secure the most equitable production and distribution of the wealth of the country in the best interests of the people ”.⁶⁵

During the Independence Conference, the British and the Zambians required only two weeks to design the future constitutional order of Zambia and agreed to use the already existing Constitution which had been drafted in the previous year by the British Colonial Office. Although there had been some African participation in this process, this merely involved the expression of “views” to the Monckton Advisory Commission. The only point which was subject to real debate during the Conference on Independence was raised by the British and regarded the issue of the applicability of the provision on the right to property not only to individual persons but also to legal persons such as companies or unincorporated associations.⁶⁶

⁶² For the list of the objectives contained in the UNIP pre-independence constitution, see K. Kaunda, *Humanism in Zambia. A Guide to Its Implementation*, Government Printer, Lusaka, 1966, pp. 9-10.

⁶³ Para. (k). The list of the objectives of the post-independence UNIP’s constitution are also in *ibidem*, p. 11.

⁶⁴ Para. (a).

⁶⁵ Para. (c).

⁶⁶ See *Northern Rhodesia Independence Conference, Papers for Discussions and Consideration*, DO 183/78.

Therefore the insertion of a liberal Bill of Rights was not the product of a careful debate. Indeed, the fact that the drafting of the independence constitution was carried out before the attainment of independence and with the participation of the colonial power, which held the actual decision-making power, did not provide a better framework for a free discussion on the future constitutional system. While Britain saw the Constitution and specifically the bill of rights as a means to provide some form of protection for the non-African minorities remaining after its departure, the main goal for the Zambian leaders was independence and not the constitution itself which could be amended in the future. A demonstration of the ease with which agreement on the provisions on human rights was reached can be seen from the minutes of the Conference, which reveal the scarce resistance from the Zambian leaders on the few controversial points raised.⁶⁷ On the other hand, the Declaration on Fundamental Rights of the UNIP had only been drafted four years earlier. The human rights discourse was not alien to Zambian leaders, however by looking at the specific context in which it was referred to and at the following developments that were already anticipated by the UNIP post-independence constitution, it is probably true that at the time human rights were used more as a “sword” to obtain independence and as a “shield” to reassure the international community.⁶⁸

The 1964 Constitution and its bill of rights was, therefore, the outcome of a rather hasty adoption of a model with a specific regional European origin advocated by the British and facilitated by the position taken by Zambian leaders during the independence struggle.

1.3.2 The Bill of Rights

The independence constitution of Zambia contained an extensive and detailed Bill of Rights modelled on the European Convention. Preceded by a Declaratory section,⁶⁹ it recognised the

⁶⁷ One of the points raised by Kenneth Kaunda concerned the procedure for the amendment of the constitution. Kaunda believed that a two-thirds majority was sufficient, thus opposing the idea of introducing a referendum for certain matters among which the Bill of Rights; see *Minutes of Sixth Plenary Session N.R.I.*, (1964), 6th Meeting.

⁶⁸ Zimba, *The Zambian*, cit., p. 86.

⁶⁹ Section 1: “Whereas every person in Zambia is entitled to the fundamental rights and freedoms of the individual, that is the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely –(a) the right to life, liberty, security of the person and the protection of the law; (b) freedom of conscience, of expression and of assembly and association; and (c) protection for the privacy of his home and other property and from deprivation of his property without compensation; the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest”. This section has merely the value of a preamble, which lacks binding legal effect as decided in the case of *Nkumbula v The Attorney-General of Zambia* (1972) ZLR III.

right to life⁷⁰ and to personal liberty,⁷¹ the freedom from slavery and forced labour⁷², the freedom from inhuman treatment,⁷³ the right to property and freedom from its deprivation,⁷⁴ the right to privacy of home and other property,⁷⁵ the right to protection of the law,⁷⁶ the freedom of conscience including the freedom of thought and religion,⁷⁷ the freedom of expression,⁷⁸ the freedom of assembly and association,⁷⁹ the freedom of movement,⁸⁰ the freedom from discrimination on the grounds of race, tribe, place of origin, political opinions, colour or creed.⁸¹ In the latter regard, it should be emphasised that the protection from discrimination was subject to some exceptions, which contributed to the legitimisation of discrimination against women. The first one was derived from the provision that the prohibition of discrimination did not apply in the sphere of application of customary norms.⁸² Thus, the principle of non-discrimination “shall not apply to any law so far as that law makes provision – (d) for the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons”.⁸³ Furthermore, the principle of non-discrimination did not apply in the field of personal law. The Constitution stated that it was not applied “with respect to adoption, marriage, divorce, burial, devolution of property on death and other matters of personal law”.⁸⁴

The right to personal property was given extensive protection in the Constitution, which resulted in the inclusion of detailed limitations imposed on the compulsory acquisition of property, as well as guarantees on the right of compensation. This was included due to the

⁷⁰ Section 14.

⁷¹ Section 15.

⁷² Section 16.

⁷³ Section 17.

⁷⁴ Section 18.

⁷⁵ Section 19.

⁷⁶ Section 20.

⁷⁷ Section 21.

⁷⁸ Section 22.

⁷⁹ Section 23.

⁸⁰ Section 24.

⁸¹ Section 25.

⁸² Another recognition of the traditional specificities of Zambia can be found in the institution of a House of Chiefs, to which Chapter VI is devoted. The functions of the House of Chiefs have an advisory nature: it “may consider and discuss (a) any bill introduced into or proposed to be introduced into the National Assembly that is referred to the House by the President; or (b) any other matter referred to the House for its consideration by the President or approved by the President for consideration by the House.” Moreover, the House of Chiefs had the power to submit resolutions on bills or other matters to the President, which would be laid down on Presidential initiative before the National Assembly, see s. 86.

⁸³ Section 25(4)(d).

⁸⁴ Section 25(4)(c).

fears of the European colonial powers that the Zambian authorities would impinge upon the right to private property upon the attainment of independence.⁸⁵

Political rights *strictu sensu* are not listed in the Bill of Rights, but can be derived from the constitutional provisions, which established a multi-party political system in Zambia and, in particular, from Chapter V, in which the right to register as a voter⁸⁶ and to stand for parliamentary seats⁸⁷ was regulated.

However, the actual enjoyment of the rights safeguarded was subject to significant limitation. The protection of some rights was subject to exceptions, which could be made in specific circumstances.⁸⁸ Moreover, there was a wide scope for the restrictions of rights which could occur in the following ways. The first consisted of the limitations effected by measures adopted under the authority of a law of the Parliament in the public interest such as defence, public order, public safety, public morality or public health.⁸⁹ Following the Nigerian model, in order to be considered legitimate, such measures had to be "reasonably justifiable in a democratic society" and the public interests in the name of which the limitation of rights could be imposed, constituted notions wide enough to raise interpretative problems to be solved by the judiciary.

The enjoyment of human rights could also be limited by derogative measures adopted following the declaration of a state of emergency or of threatened emergency. According to Article 26 "[n]othing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of sections 15, 18, 19, 21, 22, 23, 24 or 25 to the extent that it is shown that the law in question authorises the taking, during any period when the Republic is *at war or any period when a declaration under article 30 is in force* (declarations relating to emergencies or threatened emergencies) (emphasis added), of measures for the purpose of dealing with any situation existing or arising during that period".⁹⁰ In accordance with the European Convention, the right to life, the freedom from slavery and inhuman treatment and the right to protection of the law were excluded from the possibility of derogation. It is immediately clear from this provision that the Constitution did not supply any

⁸⁵ Section 18. Regarding compensation, other constitutions such as those of Kenya and Lesotho were even more protective of private interests. They spoke of a "prompt payment of *full* compensation" (emphasis added), while the Zambian text required "a prompt and *adequate* compensation" (emphasis added).

⁸⁶ Section 66.

⁸⁷ Sections 61-62.

⁸⁸ The rights subject to specific exceptions were the rights to life, personal liberty, freedom from inhuman treatment, slavery and forced labour, freedom from discrimination, and the right to protection of law.

⁸⁹ The rights concerned by these provisions were the right to privacy of home and other property, freedom from deprivation of property, of conscience, expression, assembly and association, and movement.

⁹⁰ The only rights not subject to derogation were the right to protection from slavery and forced labour and from inhuman treatment and the right to protection of law.

definition of what could constitute an emergency, thus giving broad discretionary power to the President who had the authority to make the above declarations. The European Convention also provides that "in time of war or other public emergencies threatening the life of the nation" derogative measures can be taken, but only "*to the extent strictly required* by the exigencies of the situation, provided that such measures are not inconsistent with its obligations under international law" (emphasis added).⁹¹

Presidential emergency powers were also regulated by the Emergency Powers Act,⁹² and the Preservation of Public Security Act,⁹³ which is related to the declaration of a threatened emergency. According to the former act, "the President may, by statutory instrument, make such regulations as appear to him to be necessary or expedient for securing the public safety, the defence of the Republic, the maintenance of public order and the suppression of mutiny, rebellion and riot, and for maintaining supplies and services essential to the life of the community".⁹⁴ In the pursuit of these goals, the President could, for example, decide the detention of persons or the restrictions of their movement, the deportation and exclusion from the Republic of persons who were not citizens of Zambia, take possession or control of any property or undertaking, or the entry and search of any premises.⁹⁵ According to the latter act, the term public security signified "the securing safety of persons and property, the maintenance of supplies and services essential to the life of the community, the prevention and suppression of violence, intimidation, disorder and crime, the prevention and suppression of mutiny, rebellion and concerted defiance of and disobedience to the law and lawful authority, and the maintenance of the administration of justice".⁹⁶ The President was entitled to provide measures such as the prohibition of the publication and dissemination of matter prejudicial to public security and the regulation and control of the production, publishing, sale, supply, distribution and possession of publications; the prohibition, restriction and control of assemblies; the prohibition, restriction and control of residence, movement and transport of persons; the possession, acquisition, use and transport of movable property, and the entry to, egress from, occupation and use of immovable property.⁹⁷

The power to declare a state of emergency was vested in the President. A control on his decisions was anyway envisaged by the constitution by subordinating the continuation of

⁹¹ Article 15.

⁹² Section 13 of the Zambian Independence Order, 1964 (Laws of Zambia, Cap. 108).

⁹³ Cap. 106 of the Laws of Zambia.

⁹⁴ Emergency Powers Act, Section 3(1)

⁹⁵ Ibidem, Section 3(2).

⁹⁶ Preservation of Public Security Act, Section 2.

⁹⁷ Ibidem, Section 3.

effects of the presidential declaration to the approval of the National Assembly. In the case that a declaration was made when the Parliament was sitting or had been summoned to meet within five days, the declaration ceased to have effect upon the expiration of a period of five days commencing from the day on which the declaration was published,⁹⁸ otherwise the declaration lost its effect upon the expiration of a period of twenty-one days, beginning from the date of publication of the declaration unless it was approved by a resolution passed by the National Assembly.

These provisions did not constitute an innovation in Zambia nor in the former British colonies in general. The provisions concerning the derogation from fundamental rights and freedoms represented a colonial heritage. The President of the sovereign Zambian State was attributed the same powers as the colonial Governor and the Preservation of Public Security Act was essentially the same as the Preservation of Public Security Ordinance of 1960, which was renamed in 1964. The latter came into operation before independence in July 1964⁹⁹ with the declaration of a threatened emergency issued by the colonial Governor, which remained in force in Zambia until 1991.

With regard to the enforcement of protective provisions, the 1964 Constitution provided the citizens with a minimal form of protection. Any person who alleged that any of the rights and freedoms protected "have been, is being or is likely to be contravened in relation to him" could apply to the High Court for redress. The latter could "make such order, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 13 to 26 (inclusive) of this Constitution".¹⁰⁰ The Constitution envisaged, furthermore, that if the question of the violation of a provision included in the Bill of Rights emerged during a proceeding pending before a subordinate court, the person presiding over the court "may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous or vexatious".¹⁰¹ No appeal could be presented against a determination of the High Court which dismissed an application as frivolous or vexatious. As clarified in the case *Harry Nkumbula v the Attorney-General for Zambia*,¹⁰² the

⁹⁸ The declaration, once approved by resolution of the National Assembly, could remain in force for a period of six months and its effectiveness could be extended for further periods of six months as well as revoked at any time by the Assembly.

⁹⁹ The declaration of threatened emergency was the response to the disorders provoked by the followers of the Lumpa Church lead by Alice Lenshina, who claimed to owe allegiance only to their prophetess and not to the government. During the revolts, over six hundred people lost their lives.

¹⁰⁰ Section 28(2).

¹⁰¹ Section 28(3).

¹⁰² Appeal No. 6, 1972 of 4 Dec. 1972.

reference to the violation of human rights provisions made in "*relation to him*" (i.e. the appellant) in section 28, restricts the acts which may be challenged before the High Court to administrative, executive or individual acts, but does not include laws as such. These could only acquire relevance as the legal grounds of a specific act directly affecting the appellant's rights.

Some specific safeguards were guaranteed to persons in preventive detention. They had the right to be informed of the grounds of their detention within five days from the beginning of the detention in a language which they understand. Their detention and the legal provisions under which this was effected had to be made public by notification published in the government gazette not more than fourteen days after the beginning of the detention. After a maximum of one month after the commencement of the detention and then at intervals of not more than six months, the case had also to be reviewed at intervals by an independent and impartial tribunal established by law and presided over by a person appointed by the Chief Justice. The tribunal addressed recommendations to the President on the necessity or expediency of continuing the detention. These recommendations did not have, though, any binding effect.¹⁰³

The actual protection of human rights depends largely on the presence of an independent judiciary. In this regard, the Zambian Constitution did not provide for any adequate guarantee of this as the President appointed the Chief Justice. This also applied to the judges of the Court of Appeal and the High Court. In this case, the President acted in accordance with the advice of the Judicial Service Commission, which was subject to Presidential appointment.¹⁰⁴ This body was composed of the Chief Justice, the Chairman of the Public Service Commission (also appointed by the President), a justice of Appeal or a puisne judge designated by the Chief Justice and an additional member appointed by the President.¹⁰⁵

Other safeguards were envisaged within the context of the legislative activity of the Parliament. In this respect, an interesting feature of the Zambian Constitution was special procedure envisaged in section 27, which allows for an assessment by a special tribunal of the compatibility of bills and statutory instruments with Chapter III. According to this special procedure, which was in fact never used, the tribunal was to be appointed by the Chief Justice and was composed of two persons selected "from amongst persons who hold or have held the

¹⁰³ See Sections 26(2) and (3).

¹⁰⁴ See Section 97 and 98.

¹⁰⁵ See Section 104.

office of a judge of the High Court". The appointment of this special tribunal was provided to take place when not less than seven members of the National Assembly made a request to the Speaker for a report on a bill, within three days after the final reading by the Assembly. In the case of a statutory instrument, the request had to be submitted to the relevant Minister within fourteen days after its publication in the gazette. The report of the tribunal had to be presented to the President and to the Speaker of the National Assembly. The Constitution did comment directly on the effect of a report alleging the violation of the Bill of Rights. It results indirectly from section 71(4)¹⁰⁶ that the President made the final decision as he was entitled to either deny or concede his assent to the bill, and also to affirm or annul the statutory instrument. In the case of withholding of the assent to the bill, this had to be returned to the National Assembly and could only be submitted to the President again if it had received the support of not less than two-thirds of the members of the Assembly within six months.¹⁰⁷ In this case, the President could either agree to the bill within twenty-one days of its presentation or dissolve the Assembly, which entailed the indictment of the presidential elections.

Another function of the special tribunal involved the granting of legal aid. The Chief Justice had the power to appoint the tribunal when he "considers it necessary for the purpose of determining claims for legal aid in respect of proceedings under section 28", for an alleged violation or threatened violation of a right guaranteed in the Constitution.¹⁰⁸ The tribunal could grant aid at public expense when the applicant "intends to bring or is an applicant in proceedings under section 28(1) or 28(4)", "had reasonable grounds for bringing the application" and could not "afford to pay for the costs of the application".

A final guarantee for the effectiveness of the protection of human rights came from the special procedure for the amendment of the Bill of Rights.¹⁰⁹ The ordinary procedure of amendment of the constitution was that the relevant bill had to be approved by not less than two-thirds of all of the members of the National Assembly. In the case of a revision concerning the Bill of Rights, the relevant bill also had to be submitted to a referendum¹¹⁰ and had to be supported by the votes of a majority of all the persons entitled to vote in order to

¹⁰⁶ This stated: "Provided that if the President withholds his assent to a bill in respect of which a tribunal has reported under section 27 of this Constitution that it would, if enacted, be inconsistent with Chapter III of this Constitution, the bill shall be returned to the Assembly *only if the President so directs.*" (emphasis added).

¹⁰⁷ Section 71(4)(5)(6).

¹⁰⁸ Section 27(1)(b).

¹⁰⁹ Section 79. After the amendment bill has been published for not less than thirty days in the government gazette, it had to be submitted to a referendum. Only if it obtained the support of the majority of the persons entitled to vote in the referendum it could be submitted for reading to the National Assembly. The special procedure applied also to the article which regulated the amendment procedures.

¹¹⁰ Section 72 (3).

come into force. The bill would be considered approved if it obtained the vote of a two-third majority of the members of the Assembly in the second and third readings. The special procedure should have been a bulwark against revision, which conversely it did not prevent. Upon independence, Zambia, along with many other African countries, featured a dominant party, which made constitutional revision a simple endeavour.

CHAPTER 2: The 'Transplant' of the Liberal Model of Human Rights in Francophone Africa

In this thesis, the term Francophone or French-speaking Africa refers to the French colonies. These include the following countries: Benin, Burkina Faso, Cameroon, Congo, Côte d'Ivoire, Gabon, Guinea, Madagascar, Mali, Mauritania, Niger, Central African Republic, Senegal, Chad and Togo. With the exception of Guinea, they all followed the same path to independence. Moreover, at independence all of the constitutions, including Guinea, were modelled on the 1958 French Constitution.

2.1 The Constitution-Making Processes

Francophone constitutions were drafted after the territories under French domination achieved autonomy following the adoption of the French Constitution of 4th October 1958, which entitled the overseas territories to decide whether to join the Community provided for by the Constitution itself. Article 1 states: "*La République et les peuples des territoires d'outre-mer qui, par un acte de libre détermination, adoptent la présente Constitution instituent une Communauté*". The Community was to be presided over by the President of France and the overseas territories could participate as member states enjoying the status of Republics with full internal autonomy (ex Article 77).¹¹¹ The decision to join the Community was to be taken after the referendums on the new Constitution. In the case of a positive vote the territorial assemblies could resolve either to adhere to the Community or maintain the status quo (ex Article 76(1)) or become "*département d'outre-mer*" as provided for in Article 76(2). In the case of a negative vote on the Constitution, the overseas territories would achieve full independence outside the Community.¹¹²

The referendums on the Constitution, which were held in October 1958, were preceded by a visit of the President of France to the overseas territories from 21st to 27th

¹¹¹ The Community was responsible for international relations, defence, money, joint economic and financial policy and the matter of strategic material as well as (except for the case of special agreements, the administration of justice) higher education and the general organisation of transports in common and telecommunications (Article 78). Special agreements could create other Community powers or regulate the transfer of the powers of the Community to one of its Members; see Egyptian Society of International Law, *Constitutions of the New African States. A Critical Survey*, Brochure No. 17, 1962, pp. 8-14.

¹¹² Article 86 of the French Constitution provided for the right of the member States to leave the Community. On the basis of that provision in 1960 African States gained full independence and international personality through agreements which were made with France transferring sovereign powers. As a result of the constitutional law of 4th June 1960, a Member State was allowed to gain full independence "without thereby ceasing to belong to the Community". Madagascar was the only one which did not adopt a new constitution opting for a revision of the constitution of 1959.

It has also to be pointed out that with the collapse of the Federation of Mali, the Republic of Sudan named itself Republic of Mali and adopted an independent Constitution in 1960.

August. During this visit, he underlined that Africans were completely free to choose and that France would not interfere. At the same time, however, he emphasised that in the case of a negative vote on the constitution, France, "*en tirera bien sûr les conséquences*". In light of this, only Guinea¹¹³ voted against it at the referendum, thus endorsing the position taken by Sekou Touré.¹¹⁴ After the referendum, all of the territories which voted in favour of the Constitution, except for the five which opted for the status quo, decided to join the Community.¹¹⁵

The achievement of the status of Republic entailed the adoption of constitutions.¹¹⁶ The overwhelming majority were drafted and approved by the territorial assemblies,¹¹⁷ in other words, by assemblies elected on the basis of a French law enacted when these countries had still the status of overseas territories.¹¹⁸ The assemblies attributed to themselves constituent powers with the same deliberations with which they decided after the referendums on the status of the territory which they represented. The only exceptions were Niger and Madagascar. In Niger, a new assembly with constitutional and legislative powers was elected after the dissolution of the territorial assembly, which followed the resignation of the Head of Government. In Madagascar, a National Assembly with constituent powers was elected by the congress of the provincial assembly.¹¹⁹

The three features that were so evident in the constitutional processes in Anglophone Africa were not so apparently present in the constitutional processes of French-speaking

¹¹³ Also in Niger, the head of government, M. Djiho Bokari, and in Senegal both the Party of Independence and trade unions were against the Community but the pressures exerted by France on the customary chiefs prevented these two countries from voting no.

¹¹⁴ The threat made by France was actually fulfilled. France stopped the financial aid which it had attributed to Guinea until then, and it did not recognise the new state. However, one year later were co-operation agreements concluded with Guinea, which were interpreted as equivalent to a recognition of the State.

¹¹⁵ See P.F. Gonidec, *Constitutions des États de la Communauté*, Sirey, Paris, 1959, pp. 1-6.

¹¹⁶ Guinea adopted its constitution on 12th November 1958 after the referendum. The other Francophone states adopted their constitutions in 1959: Sudan, 23rd January; Senegal, 24th January; Central Africa Republic 9th February; Dahomey, 15th February; Gabon, 20th February; Congo, 20th February; Upper Volta, 28th February; Niger, 12th March; Mauritania, 22nd March; Côte d'Ivoire, 26th March; Chad, 31st March; Madagascar, 29th April. In 1959 Senegal and Sudan formed the Federation of Mali, whose constitution was adopted on 17th January 1959.

¹¹⁷ The Constitution of Guinea was also adopted by the Territorial Assembly.

¹¹⁸ These assemblies were created on the basis of a law of 1956. They were elected with universal suffrage and in a single national constituency. A wide range of matters (territorial services) were attributed to the Territorial Assemblies and to Governmental Councils elected by the Assemblies.

¹¹⁹ A completely different situation was that of Togo and Cameroon which, as trust territories, obtained statutes drafted directly by France in 1958. Togo was a UN trusteeship under French administration from 1946 to 1958. Its independence was proclaimed on 27th April 1960. Cameroon was a trust territory under mandate to the League of Nations under French (East Cameroon) and British administration (West Cameroon). The French Cameroon received internal autonomy by a decree of 16th April 1957. East Cameroon was granted independence on 1st January 1960. The Federal Republic of Cameroon was formed on 1st October 1961 following a plebiscite on which the Southern part of West Cameroon decided to join the East Cameroon (the northern part chose to join Nigeria).

Africa. In reality, however, the latter were also characterised by an important role being played by the colonial power, by the link with the independence processes and by the lack of a real debate on the constitutions.

With regard to the first point, it should be taken into account that France was not indifferent to the constitutional choices made by its former territories even though it is true that its intervention in the constitutional processes was more limited than that displayed by Britain. The French Constitution formally allowed African countries to adopt any kind of constitutional system, provided it respected the provisions regarding the Community included in Title XII of the Constitution, the principles of “*liberté, égalité, fraternité*” mentioned in the preamble (“*La République offre aux territoires d’outre-mer qui manifestent la volonté d’y adhérer des institutions nouvelles fondées sur l’idéal commun de liberté, d’égalité et de fraternité et conçues en vue de leur évolution démocratique*”) together with the principle of democracy proclaimed both in the preamble and in Article 77 of the French Constitution. Contrary to the opinion of Fisher, the formal absence of further constraints on the constituent power of African countries does not mean that “*la pratique française ne témoigne pas d’intérêt pour la constitution en tant que moyen susceptible d’assurer la transmission du modèle et l’exportation des institutions ou de garantir le maintien de certains liens et le respect de certains intérêts*”.¹²⁰ As Gonidec has pointed out, France also intervened in the constitutional processes of its former territories, albeit in a less evident manner than Britain. All of the Francophone constitutions were, indeed, not only drafted with the assistance of French experts but also under “*certaines influences occulte d’ordre politique*” originating from representatives of the French government.¹²¹ Evidence of the weight carried by France in the constitution-making processes can be seen from the differences in the contents existing between the Constitution of Guinea, that is of the only former French territory which decided not to join the Community, and the remaining Francophone constitutions. The latter were all shaped on the French constitutional model, while the former included some elements of originality with respect to the French system.

As in Anglophone countries, the constitution-making processes in the ex-French territories were conditioned by the independence processes. The Community undoubtedly needed a certain extent of constitutional homogeneity among the Member States, which could only be realistically achieved by imitating the French system.

¹²⁰ Fisher, *La décolonisation*, cit., p. 828.

¹²¹ Gonidec, *Les droits*, cit., p. 80 and Gonidec, *Constitutions*, cit., p. 7. A. Mabileau, “La Communauté et la francisation limitée du régime”, in A. Mabileau et J. Meyrat, *Décolonisation et régimes politiques en Afrique noire*, Colin, Paris, 1967, p. 28.

Finally, with reference to the lack of debate in the constitutional processes, it is true that Francophone constitutions were approved by elective African assemblies, however, their role was actually confined to a mere ratification of texts to which they had not contributed. The governments drafted the constitutions with the assistance of advisory bodies, whose members in some cases were appointed by the governments (for example the constitutional commission of Senegal), in others by the assemblies (for example Congo) and by the governments together with the assemblies (for example Madagascar). The projects were then approved by the assemblies without a real debate.¹²² Only the Constitution of Upper Volta provided that the Constitution approved by the Assembly had to be compulsorily submitted to a referendum. Other states also provided for referendums on the constitutions, but this was confined to the case in which the projects had not been adopted with qualified majority, which in reality never occurred. All of the constitutions were approved unanimously or almost unanimously. In this regard, it is important to take into account that many states in French-speaking Africa already had single or dominant party political systems. In such situations, therefore, the approval of the governmental projects was rather easy to achieve. Moreover, the constitutions of French-speaking Africa were also drafted "à la hâte"¹²³ as the primary importance for African leaders was the accession to government, for which an established constitutional framework was required.

2.2 The Constitutional Recognition of Fundamental Rights and Freedoms

All of the constitutions of the French-speaking Africa states adopted after the referendum of 1958, including that of Guinea, recognised individual rights and freedoms. The constitutional recognition of fundamental rights in French-speaking Africa seems to have been the outcome of an African choice, albeit conditioned by the particular situation in which it was taken. It seems, indeed, that France was not particularly interested in the embodiment of provisions on liberties in the constitutions of its ex-territories. Thus, on 12th June 1959, the President of the French Community adopted a decision in which he stated that the member states had an obligation to ensure the enjoyment of individual rights and freedoms "*tels qu'ils ont été rappelés par la Constitution de 4 Octobre 1958*".¹²⁴ Moreover, the *Cour Arbitrale* would have been given the competence to guarantee that this obligation was respected. In this way, it was

¹²² Gonidec, *Les droits*, cit., p. 82.

¹²³ G. Conac, "L'évolution constitutionnelle des Etats francophone d'Afrique Noire et de la République Démocratique Malgache", in G. Conac (dir.), *Les Institutions constitutionnelles des Etats d'Afrique Francophone et de la République Malgache*, Economica Ed., Paris, 1979, p. 11.

¹²⁴ J.O. Communauté, 15th June, p. 45.

implied that there was no need for the member states of the Community to provide for a constitutional definition of liberties.¹²⁵ In French-speaking Africa, however, the constitution as a whole and in particular the proclamation of liberties were seen as symbols of the accession to independence and of the achievement of the same dignity as the other members of the international community.¹²⁶ Thus, there was the idea that “*la formulation d’un régime politique serait incomplète*”¹²⁷ without the inclusion of provisions protecting fundamental rights in the constitutions.

Following the French example, the recognition of liberties was contained in the preambles to the constitutions. The only exceptions were the constitutions of Dahomey (today Benin), Senegal and Chad, which also included provisions protecting certain rights in the bodies of the constitutions.

The technique used for the guarantee of human rights was achieved, in the overwhelming majority of cases, through references (in the preambles) to the French constitution, which refers to the Declaration of the Rights of Man and the Citizen of 1789, and to the preamble of the French Constitution of 1946.¹²⁸

Most of the constitutional charters, which referred to the French constitution, also contained a reference to the Universal Declaration of Human Rights.¹²⁹ Furthermore, the constitution of Madagascar, which expressly defined the rights and freedoms protected, stated that its source of inspiration was the Universal Declaration. Although lacking such a clear statement, the list of rights and liberties proclaimed in the preamble to the constitution of the Central African Republic also reveals that it used the Universal Declaration as a model.

The same conception and definition of liberties present in the constitutions enacted immediately after the referendum of 1958 can be found in the charters which were adopted in 1960 upon the achievement of full independence, including the independence constitutions of Togo of 1960, Cameroon of 1960 and later the Federal Republic of Cameroon of 1961. These constitutions, indeed, formally referred to the French Declaration of 1789 either in their preambles or, less often, in the constitutional texts, and often along with a commitment to

¹²⁵ The problem raised by this solution was that when dealing with human rights, the French Constitution only refers to the French people (*Le peuple français proclame solennellement son attachement aux droits de l’homme ...*). Moreover, the attribution of competence in this field to the *Cour Arbitral*, whose general competence is to solve controversies which emerge among states, would have entailed the intervention of the President of the Community as “*gardien de la Constitution*”. The final result would have been a limitation of the sovereignty of the member states; see Gonidec, *Constitutions*, cit., p. 8.

¹²⁶ See A. Hauriou and J. Gicquel, *Droit Constitutionnel et institutions politiques*, Montchrestien, Paris, 1980.

¹²⁷ C. Leclercq, “Les libertés publiques en Afrique noire”, in Conac, *Les institutions*, cit., p. 224.

¹²⁸ See Constitutions of Côte d’Ivoire, Dahomey, Gabon, Upper Volta (today Burkina Faso), Mauritania, Senegal, Sudan and Chad.

¹²⁹ For example the Constitutions of the Côte d’Ivoire, Dahomey, Gabon, Senegal and Chad.

respect for the Universal Declaration.¹³⁰ Other constitutions featured a detailed discipline of rights and freedoms in the bodies of the constitutions (see Article 2 of the Constitution of Dahomey, Article 2 seq. of the Constitution of Senegal, Article 5 of the Constitution of Chad) or in the preambles. Both the Constitutions of Madagascar of 1960 and that of Gabon of the same year, as well as the Constitutions of Senegal of 1960 and 1963, embodied a detailed list of rights together with a formal reference to the French Declaration of 1789, as well as to the Universal Declaration of 1948. The Constitution of the Central African Republic of 1960, similar to the preceding one of 1959, contained an elaborate definition of the fundamental rights in the preamble.

This overview clearly shows the predominant liberal inspiration of the first Francophone constitutions adopted after the referendum of 1958. This emerges not only indirectly from the sources to which these constitutions referred but also from the list of rights explicitly mentioned, i.e. only civil and political rights. The only exception was the constitution of Guinea of 1958, which, after proclaiming the guarantee of the classic liberal rights and freedoms, recognised some of the so-called 'second-generation rights' in Article 44, including the right to work, rest, social assistance and education. Nevertheless, even Guinea, which was a Marxist-Leninist regime, adopted an approach to the issue of the protection of fundamental rights which was largely inspired by the liberal constitutional culture. Its constitution, indeed, only devoted Article 44 to social rights and committed itself to the protection of civil and political liberal rights, as turns out not only with regard to the rights expressly proclaimed but also in a statement contained in the preamble according to which "[t]he State of Guinea adheres fully to the Charter of the UN and to the Universal Declaration of Human Rights".

The liberal underpinning of these constitutions is also confirmed by the virtual total absence of references to duties, which conversely characterised the constitutions enacted in the following years.¹³¹ The only exception was the constitutions of Guinea of 1958 which mentioned citizens' duties. Title X of the constitution of Guinea was entitled "On the rights and fundamental duties of citizens" and dedicated two articles to the latter. According to Article 47 "[a]ll citizens of the Republic of Guinea shall conform to the Constitution and other

¹³⁰ See the Constitutions of the Côte d'Ivoire of 1960, Mauritania of 1961, Niger of 1960, Cameroon of 1961 and Togo 1960.

¹³¹ All of the Francophone states underwent a situation of chronic instability from the end of 1962 which was made evident by the succession of numerous constitutions. Ouguergouz, *La Charte*, cit., p. 30 and Leclercq, *Les libertés*, cit., pp. 227-228.

laws of the Republic, pay their taxes and fulfil in an honest manner their duties". Moreover, Article 48 proclaimed "the sacred duty" of the defence of the nation.

Furthermore, it is interesting to observe that the Western inspiration of these constitutions was mitigated only in these three by references to an African distinctive character. In the Constitutions of Senegal and Togo, the awareness of the existence of elements which distinguish African societies was translated in specific terms with regard to the protection of rights. In this way, the Mali constitution of 22nd November 1960 referred in its preamble to the concept of African personality, stating that "[t]he Republic of Mali shall organise the conditions necessary to the harmonious development of the individual and of the family within a modern society and with respect for the *African personality*" (emphasis added). Moreover, it added that "[t]he people of Mali conscious of the historical, moral and material imperatives which unite the States of Africa, desirous of accomplishing the political, economic and social unity which are necessary to the affirmation of *African personality*, affirms its determination to pursue its task with a view to the realisation of African unity" (emphasis added). The preamble to the 1963 Constitution of Senegal which replaced that of 1960 maintained the inspiration of the preceding one,¹³² and similar to the Constitution of Mali, it contained a reference to the ideal of African personality: "*conscient de la nécessité d'une unité politique, culturelle, économique et sociale, indispensable à l'affirmation de la personnalité africaine*". The constitution of Senegal, however, did not confine itself to this concept but also acknowledged in terms of rights one of the typical features of African societies, that is, their communitarian dimension. Thus, it recognised the rights and liberties of the human person, the family and also "*les collectivités locales*" and recognised not only the individual but also the collective property.

As mentioned above, when dealing with the issue of human rights, it is crucial to examine their enforcement. In this regard the Francophone constitutions seem quite weak.¹³³ They did not generally include provisions ensuring judicial protection to the rights formally recognised. Only the Constitutions of the Côte d'Ivoire, Mauritania and Guinea had provisions for the enforcement of the protected rights. Moreover, in the Constitutions of the

¹³² M. Prouzet, "Les procédures de révision constitutionnelle", in Conac, *Les institutions*, cit., p. 314.

¹³³ In this regard L.O. Adgebite has classified African constitutions in three classes: 1. Constitutions where rights are precisely defined and provided with judicial remedies (Constitutions of Liberia, Nigeria, Sierra Leone, Gambia, Uganda, Kenya, Malawi, Botswana, Lesotho and Somalia); 2. Constitutions where rights are declaratory and formulated in general terms (Francophone constitutions); 3. Constitutions which provide for the Ombudsman (Constitution of Tanzania). L.O. Adgebite, "African Attitudes to the International Protection of Human Rights", in A. Eide and A. Schou (eds.), *International Protection of Human Rights, Proceeding of the Seventh Nobel Symposium*, Oslo, September 25-27/1967, Almqvist and Wiksells Bocktryckery A.B., Uppsala, 1986, pp. 77-78.

Côte d'Ivoire and Mauritania, the judicial protection of rights was granted only to the right to be presumed innocent until one's guilt has been established: "[t]he judicial authority, guardian of individual liberty, shall ensure respect for this principle under conditions stipulated by law".¹³⁴ The Constitution of Guinea, on the contrary, stated in Article 37 that "the judicial authority, guardian of the individual liberty, shall ensure the respect of the rights of citizens under conditions stipulated by law" without restricting judge's intervention to a specific right.

A final delicate question raised by these constitutions relates to the fact they did not envisage the possibility of challenging a law violating rights and freedoms. The inclusion of the recognition of the latter in the preambles made this even more unlikely because of the controversial legal force of preambles. Consequently, in the majority of jurisdictions, the competent bodies which check the constitutionality of the laws could not declare a law as constitutionally illegitimate for violation of the rights and freedoms protected in the constitution. Along with the controversial binding force of the preamble,¹³⁵ the weakness of the human rights protection in these constitutions was linked to the weakness of the constitution themselves as effective documents. To a greater extent than Anglophone Africa, Francophone Africa displayed a high rate of constitutional instability, with constitutions frequently repealed, suspended and changed. Moreover, the recourse to special legislation and jurisdictions made the provisions protecting human rights inapplicable. The value of the constitutions and especially of the provisions concerning fundamental rights and freedoms rested on their symbolic weight, which was independent of their actual implementation.

2.3 Benin: The 1959 and 1960 Constitutions

Benin, which was called Dahomey until 1975, is an artificial creation of France, which unified the northern Reigns of Bariba and Djougou and villages with proto-state organisation with the southern Reigns of Abomey and Porto-Novo, which was comprised of approximately fifty ethnic groups. If a common feature of these different entities is to be found, this is represented by the fact that, apart from the villages in the North, they were all monarchies with decentralised systems based on chieftaincies (*chefferies*). Differences, however, existed with regard to their political and social evolution as the Reign of Abomey was more advanced than

¹³⁴ Article 62, Constitution of the Côte d'Ivoire; Article 49 of the Constitution of Mauritania.

¹³⁵ This was solved in France in an affirmative sense by the French *Conseil constitutionnel* in 1971. In sub-Saharan Africa, a recognition of the binding force of preambles was stated by Philippe Yace, President of the National Assembly of Côte d'Ivoire, who stated: "*Le préambule n'est pas un simple énoncé de principes philosophiques et moraux exempt de valeur juridique. Il a même valeur que la constitution, il est source de droits positifs, à l'égard des pouvoirs publics et des particuliers*", quoted in G. Conac (dir.), *Dynamiques et finalités des droits africains*, Economica Ed., Paris, 1980, p. 393.

the others. Moreover, both in the North and in the South, animism was widespread, however Islam was professed in the North and Christianity in the South. The existing differences between the North and the South were accentuated by the politics of the French, which privileged the South over the North. The lack of infrastructure and educational opportunities in the South were among the most visible signs of such politics. With regard to education, however, the establishment of schools by France in the Islamic North was also hindered by its strong opposition to the colonial presence and specifically to colonial educational institutions. The result was a gap in the development of the two regions, which also continued after the end of the French colonisation.¹³⁶

It is against this background that the colony of Dahomey acquired independence on 1st August 1960 and adopted its first constitution as an independent state on 25th November 1960. Its first constitution, however, dates back to 1959 when Dahomey opted for becoming a Republic as a member of the French Community.

2.3.1 The Constitution-Making Processes

The liberal principles, which can be found in both the 1959 and 1960 constitutions, are due to a large extent to the modalities of development of the processes, which firstly led to autonomy in Dahomey and then to independence.

The enactment of the 1959 constitution did not involve much time or debate because, as argued above, its content was heavily conditioned by the participation of Dahomey in the French Community. Thus, on 4th December 1958, the Republic was proclaimed and on 15th February 1959, the *Assemblée Territoriale*, which had become *Assemblée Nationale Constituante*, adopted the constitution.

In addition, the content of the independence constitution, and above all of the parts relating to fundamental rights and freedoms, did not give rise to much discussion. This depended on Dahomey's leaders being more concerned with affirming their power in a political struggle dominated by a regionalist logic than with what form of state and government to design for their country.

In 1959, the government of the Republic of Dahomey was composed of three parties which emerged from the fragmentation of the *Union Progressiste Dahomeyan*, in other words: the *Bloc Populaire Africain*, which later took the name of *Union Démocratique Dahoméenne* (UDD) led by Justin Ahomadegbé, the *Parti Républicain du Dahomey* (PRD)

¹³⁶ S. Decalo, "Regionalism, Politics, and the Military in Dahomey", in 7 *The Journal of Developing Areas*, 1973, p. 451.

led by Sorou Migan Apity and the *Rassemblement Démocratique Dahoméen* (RDD) led by Hubert Maga. All of these parties had a geographical character. The UDD represented the Southwest of the country, the PRD the Southeast and the RDD the North. Since then, regionalism appeared the main challenge within the political landscape of the country. The choice of which party to support was linked to its regional imprint and a strong appeal was also exerted by the personality of the leader, who was identified with the party itself and respected in the same way as traditional chiefs were.

The relationship between the three parties, which formed coalition governments, was not easy. They were unable to even find an agreement on the issue of independence. The UDD was overtly against it and the RDD held an ambiguous position. In reality, only intellectuals pushed for independence. Political parties later manifested their support to the cause of independence merely because of the influence exerted by Felix Houphoët-Boigny in Côte d'Ivoire and the *Conseil d'Entente*.¹³⁷ The choice for independence was therefore not the result of a political debate, but rather of a rapid decision determined more by external rather than internal forces. As Glélé has written: "*Chacun voulut se faire passer pour le champion de l'Indépendance ou du nationalisme dahoméen, mais en réalité personne n'avait mesuré la portée de la démarche, personne n'avait réfléchi à l'Indépendance*".¹³⁸ The absence of an analysis of the meaning of such a step was reflected in the constitution adopted after the attainment of independence on 1st August 1960. On 20th October 1960, the Prime Minister Maga presented a project of constitution to the Legislative Assembly. A Committee composed of eighteen members, with six from each party, was set up with the task to examine it. While the project was pending, the political clash between the parties became worse. The UDD accused the Premier of regionalism and presented a "*motion de censure*" against the government. Moreover, the situation in the country was made tense by a strike organised by trade unions linked to the UDD and by threats of secession coming from the North. The idea that a single party would be more appropriate to the contingent situation was raised by the UDD as well as by students and workers' organisations. After a first failed attempt, the RDD of Maga and the *Parti des Nationalistes Dahoméens*, which resulted from the union of the PRD of Apity with the *Parti de la Fédération Africaine* of Derilin Zinsou, formed the *Parti Dahoméen de l'Unité* (PDU) on 13th November 1960. L'UDD did not participate in this union. These political developments did not have any impact on the composition of the *ad hoc*

¹³⁷ The *Conseil d'Entente* was a federation established on 29th May 1959 between the Côte d'Ivoire, Dahomey, Haute-Volta and Niger.

¹³⁸ P.-F. Glélé, *Naissance d'un état noir (L'évolution politique et constitutionnelle du Dahomey, de la colonisation à nos jours)*, LGDJ, Paris, 1969, p. 180.

Committee. However, already before these events, the constitution had appeared to be a matter of political polemic rather than debate. The contrast did not really concern the content of the project presented by the government, but rather the legitimacy of the Assembly to adopt the constitution. In response to this objection, a law approved on 8th November 1960 transformed the National Assembly into a Constitutional Assembly. On 25th November 1960, the Constitution, similar to the one of 1959, was approved unanimously following the submission to the Assembly of some modifications to the project originally presented by the Premier and concerning the provision for a Vice-President (14th November).

2.3.2 The Constitutional Protection of Fundamental Rights and Freedoms

The 1959 Constitution followed the same pattern as the other constitutions of the French Community, as it was also modelled on the 1958 French Constitution. The commitment of the Republic of Dahomey to protect fundamental rights and freedoms is expressed in the preamble and in Articles 1 and 3, which enshrined the principle of equality, religious freedom and the right to form political parties. The preamble stated that Dahomey “*affirme son attachement au droit à la libre détermination des peuples et aux libertés fondamentales de l'homme définies par les déclarations des Constitutions de la République française*”. As far as the form of government was concerned, the constitution introduced a parliamentary form of government with a legislature with a single house.

In the 1960 independence constitution, the preamble sanctioned the new state's commitment to safeguard human rights by referring to the French Declaration of the Rights of Man and of the Citizen, the Universal Declaration and the constitution itself: “*Le peuple du Dahomey proclame solennellement son attachement aux principes de la Démocratie et des Droits de l'Homme, tels qu'ils ont été définis par la Déclaration des Droits de l'Homme et du Citoyen du 1789, par la Déclaration Universelle de 1948, et tels qu'ils sont garantis par la présente Constitution.*” The body of the 1960 Constitution expressly recognised the principle of equality without any distinction based on origin, race, sex and religion, the freedom of religion and the right to form political parties. Article 6 stated: “*La République assure à tous l'égalité devant la loi sans distinction d'origine, de race, de sexe ou de religion. Elle respecte toutes les croyances*”. According to Article 7: “*Les partis et groupements politiques concourent à l'expression du suffrage. Ils se forment et exercent leur activité librement sous*

condition de respecter les principes de la souveraineté nationale et de la démocratie, et les lois de la République”.¹³⁹

It could be argued that a potential threat to human rights came from the form of government. The constitution provided a President and a Vice-President elected by universal suffrage. The provision of a Vice-President was devised as a mechanism to ensure that both the North and the South would be represented in the executive. Moreover, the President was ultimately the key organ of the entire constitutional system. Gléglé has even described the system introduced in Dahomey as “*une chefferie nouveau style qui représente une synthèse des traditions africaines et des institutions d'inspiration européenne, française et américaine*”.¹⁴⁰ There was no real mechanism of checks and balances envisaged with respect to the powers attributed to the President. The President was elected for five years and was re-eligible for election without limits. He was the “*détenteur exclusif du pouvoir exécutif*” (Article 12) and also appointed the members of the government and determined their competencies. The ministries were only responsible to him. Moreover, the President was entitled to adopt exceptional measures when the institutions of the Republic, the independence of the nation, the integrity of the territory or the execution of its international engagements were under threat (Article 19). He also held competencies, which limited the sphere of action of the National Assembly. This was composed of sixty members who were elected every five years. Following the French model, the President had the power to enact regulations in all the matters which the Constitution did not explicitly attribute to the competence of the law (Article 44). In addition, the President shared the power of legislative initiative and of constitutional revision with the members of the Assembly, and had the right of veto. The Assembly could also delegate to the President the power to adopt measures in areas reserved to the law. Moreover, the Assembly did not exert any control over the executive, except for the power to vote its impeachment before the *Haute Cour de Justice* by a majority of two thirds in the case of high treason (Article 66) and to vote on the budget. Even this latter control could be superseded because the Constitution provided that if the budget was not voted upon within sixty days from the day of submission of the project, its provisions could be put into force by *ordonnance* (Article 51). The disposal on impeachment was, furthermore, virtually dead letter as not only was there no definition of high treason given by the

¹³⁹ The recognition of religious freedom, in combination with the proclamation of the secular character of the republic should not be seen as a mechanical import of a foreign principle, but rather as a way to ensure continuity to a specific characteristic of the country consisting in the coexistence of animist cults with the imported religions of Islam, Catholicism and Protestantism.

¹⁴⁰ Gléglé, Naissance, cit., p. 220.

Constitution but the High Court itself was never set up. The judiciary was weakened not only by the provision that the guarantee of its independence was conferred to the President (Article 59, 2), but also by the fact that its highest organs either had scarce powers or were never established. This observations is valid both for the High Court and for the other two judicial organs provided by the Constitution, i.e. the *Cour Supreme* and the *Conseil Supérieur de la Magistrature*. The former was charged with reviewing the constitutionality of laws, but it had only advisory powers and its advice could be requested either by the President of the Republic or the President of the National Assembly. The latter was never set up, as it could have been easily foreseen, considering that when the Constitution was drafted, the country had merely ten national magistrates.¹⁴¹

As Glélé observed the liberal-democratic principles included in this Constitution, which were already weakened by the broad powers vested in the President, “*ne correspondent pas le plus souvent à ses [du pays] traditions ni culturelles, ni politiques*”.¹⁴² In this regard, it should be noted the respect still elicited by the traditional political institutions of Dahomey despite the manipulation and transformation carried out by the colonial power. Monarchical dynasties were still strong when the constitution was adopted to the extent that national political leaders, who in many cases descended from these dynasties, more or less explicitly presented themselves and were still perceived as their representatives. This attitude reinforced in the idea in the minds of the population that party leaders could not be questioned and above all removed.¹⁴³ The vitality of traditional culture is clear if one considers that even though Dahomey had a consistent number of educated persons, to such an extent that it was called “*le quartier latin d’Afrique*”, ninety-two per cent of the population was illiterate and the great majority lived in rural areas. Moreover, the educated section of the population had been exposed to French culture and from 1944, following the introduction of elective assemblies in the colonies, it could also experience in practice the functioning of democratic institutions. However, such experience was enjoyed only by a minority of the population because the right to vote was not held by everyone but was attributed on the basis of a “*système de capacités*”. The experience of democratic institutions was also further limited in a temporal sense because these institutions were introduced only fifteen years before independence. In addition, the educated élite was composed of doctors, teachers, midwives and officials formed by the

¹⁴¹ Ibidem, p. 225.

¹⁴² Ibidem.

¹⁴³ This is the reason for the emphasis included in the constitution of the republican character of the State and the express exclusion of the republic form of state from the possibility of being subject to constitutional revision.

French to serve the colonial administration. Therefore, what was lacking was not only a widespread knowledge of constitutionalism but also, among those familiar with it, an experience of government as decision-makers.

In theory, a factor which might have contributed to the success of liberal-democracy in the country was the political maturity of its educated élite. Since the aftermath World War I, a strong anti-colonial engagement emerged and the French Declaration was used to claim an end to the abuses and exploitation imposed by France. However, the reference to the French Declaration seems to have been used as a strategic consideration rather than a real appropriation of its meaning on the part of Dahomeans. Moreover, the contacts that they had with French organisations and parties channelled political ideas coming from France, however, these were of different nature and also included non-liberal ones. For example, in the period from 1920-1921, a movement of passive resistance to colonisation was organised in the region of Porto-Novo and one of its leaders Louis Hunkarin was affiliated to a number of French movements, including both the *Ligue des droits de l'Homme*, of which he established a branch in Dahomey, and communist movements. As it will be argued in the following part, this political consciousness was among the factors of the country's political instability and also of its recent democratic renewal.

It is against this background that Gléglé concluded that the principles included in the constitution had a normative character. "*Ils expriment des vœux*",¹⁴⁴ subject to assessment by history.

¹⁴⁴ Ibidem, p. 216.

PART II: FAILURE OF THE LIBERAL MODEL OF HUMAN RIGHTS IN SUB-SAHARAN AFRICA?

CHAPTER 3: A New Constitutional Phase for Sub-Saharan Africa: Constitutions without Constitutionalism

Shortly after independence, sub-Saharan Africa witnessed a questioning and alteration, and in certain cases an outright rejection of the constitutional institutions and principles introduced upon independence. Some of the constitutions were amended, others were replaced in succession, others were suspended. In certain cases, these constitutional changes were a consequence of the successions of leaders, which was often determined by military coups d'état. New constitutional models were presented as more suitable to African culture and tradition and were experimented with in the name of a right to difference, which in certain cases was claimed in the constitutional field by the doctrine of *l'authenticité*. According to this doctrine, Africa should base its state systems on its own traditions.¹⁴⁵ This entailed the abandonment of the principles and institutional machinery which represented the initial constitutional foundations of independent African countries such as the separation of powers and the protection of civil and political rights. Presidentialism¹⁴⁶ and one-party systems introduced either *de facto* or *de iure*, which were fashioned after the Soviet model in certain states, constituted the most concrete expression of the pursuit of new constitutional forms of state organisation, which were considered as more suitable to African culture and socio-economic structures. In the field of human rights, the emphasis on the collective right to development, on economic, social and cultural rights and on duties, as well as on the corresponding challenge to civil and political rights were the main features of the conception of liberties which replaced the liberal-oriented model. Some constitutions gave expression to this new approach. However, in many cases, the erosion of the idea of rights introduced in sub-Saharan Africa at independence was not formally translated in the constitutional texts. Indeed, they tended to continue to give rights, including civil and political rights, constitutional recognition either in bills of rights or in programmatic provisions embodied in their preambles. Fundamental rights were therefore suppressed through recourse to special legislation, which was often inherited by the colonial administration. A broad interpretation

¹⁴⁵ Conac, *L'évolution*, cit., p. 19.

¹⁴⁶ The concept of presidentialism is conceived as a degeneration of the presidential form of government. The degeneration is a result of the lack of mechanisms of checks and balances with respect to the powers of the President, which in the classic presidential model are exerted by the legislature and the judiciary; see G. De Vergottini, *Diritto costituzionale comparato*, Cedam, Padova, 1993, ft. 6, p. 843.

of the conditions was also provided for by the constitutions, which allowed for the limitation of rights, apart from those regimes which did not even include a superficial veneer of legality to defend the fundamental rights violations. Among the measures with a constitutional foundation include measures taken on the basis of a broad interpretation of notions such as public order, defence or security. As seen in Part 1, in order to safeguard these public interests, some constitutions (particularly in Anglophone Africa) explicitly permitted the limitation of rights. More specifically, the concept of public order paved the way for the restriction of the freedom of press, opinion, assembly and association (especially that of a political character). Criticism of the state institutions and policy were often defined and punished as attacks on public order. Moreover, the appeal to exceptional circumstances allowed the declaration of states of crises, emergencies, necessities or sieges, during which the heads of states were constitutionally entitled to exert special powers. Constitutions were therefore used as an instrument of internal and international legitimisation, however, their existence was not a guarantee of constitutionalism.

In other cases, the restriction of fundamental rights was carried out through parliamentary or presidential acts enacted in contrast with the constitutional provisions which protected rights.¹⁴⁷ Their application was assisted by a general attitude of "judicial self-restraint"¹⁴⁸ adopted by the judiciary in the evaluation of the constitutional legitimacy of legislative or governmental acts. Derogatory measures were, for example, enacted in disregard for the formal and substantial conditions provided for by the constitutions. These measures must have been provided by a law approved by the Parliament and must have been unavoidable, temporary and proportionate. In contrast with these provisions, non-proportionate and tendentiously permanent acts were adopted.¹⁴⁹ Furthermore, the recognition of the right to personal liberty was deprived of any value by the regular adoption of preventive detention acts. The freedoms of the press and opinion were restricted by sedition laws, which provided a legal basis to define as seditious and thereby punish any expression of criticism or opposition.¹⁵⁰ However, in political situations where monopartism dominated, the freedom of the press was *de facto* suspended as newspapers, broadcasting and television services were owned by the state, i.e. by the single or dominant party. The freedom

¹⁴⁷ See Y.P. Ghai, "Constitutions and the Political Order in East Africa", 21 *International and Comparative Law Quarterly*, 1972, p. 404; V.T. Le Vine, "The Fall and Rise of Constitutionalism in West Africa", in 35 *The Journal of Modern African Studies*, 1997, pp. 189-191; B.O. Nwabueze, *Presidentialism in Commonwealth Africa*, C. Hurst, London, 1974, pp. 298-353.

¹⁴⁸ See Roberts-Wray, *Human Rights*, cit., pp. 923-924.

¹⁴⁹ On emergencies see Nwabueze, *Constitutionalism*, cit., pp. 173-185 and *Presidentialism*, cit., pp. 298-353.

¹⁵⁰ See Nwabueze, *Constitutionalism*, cit., pp. 150-151.

to form and join political parties was suppressed not only by preventing the activity of parties through political coercion or electoral malpractice, but also by governmental acts explicitly banning opposition groups.

If then we look more closely to Anglophone and Francophone Africa, some differences can be detected with regard to their constitutional law developments and also the status and conception of human rights in their respective constitutional systems.

3.1 Constitutional Developments in Anglophone Africa

With regard to human rights, the new constitutions of English-speaking Africa were not very different from those adopted at the time of decolonisation. Those Constitutions, which had originally included Bills of Rights, tended to continue to preserve them in the new or amended constitutions and to maintain the same liberal orientation. The list of rights was not only extremely detailed, but civil and political rights continued to be recognised.¹⁵¹ The Constitutions of Zambia of 25th August 1973 and Sierra Leone of 14th June 1978 are the only charters which, apart from including a long list of civil and political rights, proclaimed the duties of the individual in their preambles, whose fulfilment was considered as a necessary condition for the enjoyment of rights and freedoms.¹⁵²

However, some states adopted new constitutional texts which did not contain any reference to the protection of fundamental rights. This included the case of the Constitution of Swaziland of 9th October 1978 which replaced the independence Constitution of 1967; that of Lesotho of 16th August 1983 which followed the two constitutions of 1965 and 1966; and that of Malawi of 6th July 1966, which established a one-party system. The first sign of change in Malawi was the 1964 amendment to the Constitution of 1961, which enabled the Prime Minister to order the detention of anyone in the interest of national defence, public order and public security. However, the Charter of 1964 referred to the Universal Declaration (Article 2) and guaranteed the right to property and equality in the enjoyment of

¹⁵¹ Ouguergouz, *La Charte*, cit., p. 31. See Articles. 30-40 of the Constitution of Nigeria resulting from the amendments of 1979; of Kenya of 1969, Act n. 5 amended in 1979; of Gambia of 24th April 1970; Uganda of 8th July 1967; Zambia of 25th August 1973; Botswana of 30th September 1966 amended in 1969.

¹⁵² See paragraph 5 of the preamble to the Constitution of Zambia which proclaimed: "Recognising that individual rights of citizens including freedom, justice, liberty and equality are founded on the realisation of the rights and duties of all men in the protection of life, liberty ... within the context of our national constitution"; paragraph 13 of the preamble to the Constitution of Sierra Leone stated: "And whereas we are satisfied that men are united together in our community, it is their duty to respect the rights and dignity of their fellow men, to uphold the laws of the State and to conduct the affairs of the State so that its resources are preserved, developed and enjoyed for the benefit of all its citizens a whole and so as to prevent the exploitation of man by man". Similarly the Constitution of Tanzania of 1965 maintained in the preamble that the individual had the duty to respect others' rights and dignity.

rights and freedoms. As was mentioned above, Tanzania and Ghana are particular cases because their independence constitutions did not even include bills of rights.¹⁵³ The 1960 Constitution of Ghana, which followed that of 1957, dedicated only one article to fundamental principles,¹⁵⁴ while the Constitution of 1964 did not mention liberties at all. It was only with the constitution of 1969 that Ghana came to have a bill of rights with a liberal formulation. However, the Constitution of 1969 was replaced by another charter in 1981 after a coup d'état, which committed the state to respect fundamental human rights but without actually specifying the content of these rights (Article 1).

Tanzania did not have a Bill of Rights in its Constitution until 1984 when a Bill of Rights was inserted in the 1977 Constitution,¹⁵⁵ which entered into force in March 1985. Until then, however, liberties were loosely enumerated in the preambles, with the consequence that they were not judicially enforceable. Nevertheless, these constitutions, starting with Tanganyika's interim Constitution of 1965, provided for an alternative solution aimed at guaranteeing the enforcement of fundamental rights. This solution consisted in the establishment of a type of Ombudsman, which was called the Permanent Commission of Enquiry (PCE). This body had the power to hear citizens' complaints against the government and party bureaucrats. However, this body had to report directly to the President, who was the only person entitled to decide whether to pursue the matter.¹⁵⁶

3.2 Constitutional Developments in Francophone Africa

French-speaking Africa was characterised by the succession of many constitutions after those adopted in 1958. Between 1960 and 1985, forty-three constitutions were enacted in the eighteen French-speaking countries.¹⁵⁷ They continued to give explicit recognition to fundamental rights generally through reference in the preambles or even in the body itself of the constitutions¹⁵⁸ to both the French Declaration of the Rights of Man and of the Citizen and the Universal Declaration of Human Rights (UDHR) of 1948 or else to the UDHR alone.

¹⁵³ Chapter IV of Constitution of 1969 besides the classic liberal rights, recognised in Article 13 the right of the child and of mother as well as parents' duties towards the children. Moreover, this Constitution expressly prohibited monopartism and provided for the Ombudsman.

¹⁵⁴ Freedoms from racial discrimination, of conscience and religion were guaranteed. Moreover, the compulsory acquisition of property except on payment of adequate compensation was prohibited.

¹⁵⁵ Fifth Amendment Act No. 15 of 1984.

¹⁵⁶ C.M. Peter, "Five Years of Bill of Rights in Tanzania; Drawing a Balance-Sheet", in 1 *Eastern Africa Law Review*, 1992, p. 149-150.

¹⁵⁷ See F. Reyntjens, "Recent Developments in the Public Law of Francophone African States", 30 *Journal of African Law*, 1986, p. 75.

¹⁵⁸ This was the case of the Constitution of Senegal, Title II of which was entitled "des libertés publiques et de la personne humaine" and of the Constitution of Mali of 2nd June 1974.

The general trend continued to be a reference to the Universal Declaration. In 1988, only three constitutions mentioned the French Declaration: Côte d'Ivoire, Gabon and Senegal. Even the Constitutions of Guinea of 10th November 1958 and Benin of 26th August 1977, which were regimes of Marxist-Leninist orientation, referred to the Universal Declaration in addition to the UN Charter. Some of these constitutions also explicitly indicated the rights protected either in their preambles or in the body of the constitutions. The Madagascar and the Congo Constitutions of 31st December 1975 and 12th July 1973 respectively were the only ones which did not include any reference to either the French Declaration or the Universal Declaration, however they did mention certain specific rights.¹⁵⁹

The enforcement of these rights was conditioned by the general absence of systems of control of the constitutionality of the legislation even when provided by the constitution, as in the case of the Constitution of Togo of 1980. Furthermore, the activity of the administrative courts, which should have safeguarded the rights of citizens in respect to acts of the state, proved to be extremely weak.¹⁶⁰

The maintenance of the reference to the Universal and French Declarations did not prevent new Francophone constitutions from introducing elements which were alien to the liberal tradition. This feature distinguished Francophone charters from the Anglophone ones, which were reluctant to change the definition of rights introduced in the first independence constitutions. A new characteristic of the constitutions of French-speaking Africa was the place accorded to economic, social and cultural rights, which were only expressly included in the 1959 Constitution of Guinea after decolonisation. However, liberal rights continued to be the most prominent, apart from the constitutions of Marxist orientation, as is in the Charters of Benin of 9th September 1977, Congo of 9th July 1979, Guinea of 14th May 1982 and Madagascar of 31st December 1975. In these texts, economic, social and cultural rights were, indeed, given considerable importance. Moreover, they contained an element of originality due to the recognition of the family and the child as specific holders of rights, which indicated an attempt to give recognition to specific African values through the imported language of rights. The constitutions of the regimes which followed the Marxist-Leninist ideology also featured the suppression or consistent limitation of the right to individual property in favour of the collective propriety of the means of production.

¹⁵⁹ On the issue of human rights in this new constitutional phase in French-speaking Africa see Leclercq, *Les libertés*, cit., pp. 222-231.

¹⁶⁰ A. Ajavon, "La protection des droits de l'homme dans les constitutions des états de l'Afrique noire francophone", in 45 *Revue Juridique et Politique Indépendance et coopération*, 1992, p. 87.

The position given to citizens' duties is another aspect which characterised Francophone Africa and which illustrates how the approach to human rights in these constitutions had consistently changed since the 1960s. The value accorded to duties was clearly expressed by Bongo, the President of Gabon, in 1971: "Le citoyen n'est pas défini par son appartenance à un groupe particulier mais par un ensemble de droits et de devoirs qui font les citoyens égaux".¹⁶¹ Thus, the declaration of duties often accompanied the proclamation of rights in these constitutions. Other Constitutions which mentioned citizens' duties included those of Mali (1974), Madagascar (1975), Benin (1977), Burundi (1981), Cameroon (1972), Comoros (1975), Congo (1979), Djibouti (1977), Gabon (1975) and Guinea (1982). The most frequently imposed duties included working, paying taxes, defending the homeland, respecting the law and, in the socialist states, respecting the socialist orientation of the State, in defence of which the enjoyment of human rights was subordinated.

3.3 The Claim for a Distinctive African Approach to Human Rights

The new constitutional definition of human rights and the restriction, either *de iure* or *de facto*, of civil and political rights were justified on theoretical grounds. This constitutional phase coincided with a debate with the Western world on the idea of the universal validity and applicability of the liberal model of human rights, which found its most solemn consecration in the Universal Declaration of Human Rights.¹⁶²

It was argued that the Western conception of human rights, which has shaped international legal instruments on human rights since the Universal Declaration of Human Rights of 1948 and which focuses on civil and political rights cannot be applied in Africa. In addition, the idea that human rights (as defined in the Universal Declaration) can have a universal value was questioned. The fact that they were presented as such when the overwhelming majority of African states were still colonies,¹⁶³ and therefore without any consideration of the African position on the matter, was the most powerful evidence of the alleged cultural bias of the UDHR and of the conception of human rights it encompasses.

¹⁶¹ O. Bongo, *Gouverner le Gabon*, Imp. Bory Monaco, 1971, p. 26.

¹⁶² Behind the Universal Declaration there is not only the liberal ideology. The contribution of the Socialist countries is visible in the recognition of economic, social and cultural rights (Articles 2-27); in the provision of individuals' duties towards the community (Article 29.1) and that rights and freedoms find a limitation consisting in that they cannot be exercised contrary to the purposes and principles of the United Nations (Article 29.3) and against the rights of other individuals and groups (Article 30). The foundation on which the document is constructed is, however, liberal or to be more precise is constituted by the natural law theory. On the philosophy underpinning the Universal Declaration, see A. Cassese, *I diritti umani nel mondo contemporaneo*, Laterza, Bari, 1988, pp. 36-38 and J. Morsink, "The Philosophy of the Universal Declaration", in 63 *Human Rights Quarterly*, 1984, pp. 309-334.

¹⁶³ Only Egypt, Ethiopia and Liberia were independent states when the UDHR was adopted.

Beyond that, two main arguments were used by African leaders to sustain such a position.¹⁶⁴ First of all, it was maintained that the Western human rights conception cannot be reconciled with African needs for economic development and national unity. Secondly, it was emphasised that this notion of human rights is alien to African culture.

The assumption underlying the emphasis on development and the corresponding de-evaluation of individual human rights was the belief that these rights could only be guaranteed in a situation of social well being and political stability, for which the attainment of self-determination and economic development were essential.¹⁶⁵

It was argued that the situation of underdevelopment left behind by colonialism required a strong executive whose action could not afford to be delayed by parliamentary opposition. Thus, the priority of development was the fundamental belief on which these systems were built, conceived in terms of economic growth and stability.¹⁶⁶ According to Issa Shivji, "developmentalism" was the "ruling ideology in post-independence Africa", which operated as a "depolitisation" of the people by focusing the ideological discourse on economics to the detriment of politics. This ideology was compounded by a concentration of the political decision-making power either on the executive or the military.¹⁶⁷

At the domestic level, the argument was compounded by the claim that socio-economic rights had to be given priority over civil and political rights. The priority of social and economic rights is based on the belief that a person whose basic needs are not ensured is not interested in the so-called first generation rights. This view, effectively labelled by Rhoda Howard, as the "full-belly" thesis,¹⁶⁸ was expressed by Julius Nyerere, President of Tanzania, with the following rhetorical question:

"[w]hat freedom has our subsistence farmer? He scratches a bare living from the soil provided the rains do not fail; his children work at his side without schooling, medical care, or even good feeding. Certainly he has freedom to vote and to speak as he wishes. But these freedoms are much less real to him than his freedom to be exploited. Only as his poverty is reduced will his existing political freedom

¹⁶⁴ See R. Howard, "The Dilemma of Human Rights in sub-Saharan Africa", 35 *International Journal*, 1980, pp. 725 et seq.

¹⁶⁵ A.H. Robertson, *Human Rights in the World: An Introduction to the Study of the International Protection of Human Rights*, St. Martin's Press, New York, 1982, pp. 8-9.

¹⁶⁶ See R.I. Meltzer, "International Human Rights and Development: Evolving Conceptions and their Application to EC-ACP Relations", in C.E. Welch, Jr. and R.I. Meltzer, *Human Rights and Development in Africa*, State University of New York Press, Albany, 1984, p. 208 seq.

¹⁶⁷ I.G. Shivji, *The Concept of Human Rights in Africa*, Codesria Series, London, 1989, p. 83.

¹⁶⁸ R. Howard, "The Full-Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rights? Evidence from Sub-Saharan Africa", in 5 *Human Rights Quarterly*, 1983, p. 467.

*become properly meaningful and his right to human dignity become a fact of human dignity".*¹⁶⁹

The same view can be found in the following statement by Colonel Acheampong, the former Head of State of Ghana. He stated: "[o]ne man, one vote, is meaningless unless accompanied by the principle 'one man, one bread'".¹⁷⁰ The fact that this view was shared by two very different leaders, the former considered as a "man deeply committed to improving the lot of Tanzania's people" and the latter as "the archetypical autocratic, corrupt, military dictator",¹⁷¹ shows how entrenched the idea that the enforcement of civil and political rights should wait until the basic economic needs can be fulfilled was among African leaders. Civil and political rights were seen as a luxury which African countries could neither appreciate, nor afford.

A survey of how this argument was used to justify the restriction of specific rights will now be undertaken in order to better understand the African position in the matter. The imperative of economic development was specifically used as a basis for the limitation of civil and political liberties of speech, of the press, and to form and adhere to parties through which opposition can be expressed. It was assumed that development required a strong government which is not prevented by outside forces from pursuing this goal. The freedom of movement and residence within the borders of the state and the freedom to leave one's country were also restricted on the ground of the development-based argument. The former was limited by "villagization" programmes,¹⁷² adopted in order to rationalise the cultivation of land and the use of agricultural equipment and the freedom of movement was affected by constraints on the movement of the most educated people. The underlying assumption was that citizens have a duty to contribute to the development of their own country. On the same grounds, the right to form and to adhere to trade unions was restricted. It was maintained that workers' claims would represent an element of delay to economic growth. The only trade union allowed was that affiliated to the party. By using the development-based argument to impose the duty to work for the collectivity, often within civil service programmes, the freedom to work was also limited.¹⁷³ Furthermore, the right to property was restricted by nationalisation carried out by many governments, often at the expense of foreign individuals and corporations. Finally, the freedom of the press was restricted on the basis of the developmentist ideology. The freedom

¹⁶⁹ J.K. Nyerere, *Stability and Change in Africa*, 2 *Africa Contemporary Record*, 1969-70, C30-31.

¹⁷⁰ Amnesty International, *Background Paper on Ghana*, London, 1974, quoted in Howard, *The Full-Belly Thesis*, cit., p. 467.

¹⁷¹ *Ibidem*, p. 468.

¹⁷² See for example the villagization programmes introduced in Ethiopia by Menghistu Haile Mariam.

¹⁷³ See K. Mbaye, *Les droits de l'homme en Afrique*, Pèdone Ed., Paris, 1992, pp. 63-69.

of the press was restricted by envisaging the role of journalists as instrumental to government goals.¹⁷⁴ This ideology even constituted the basis for a permanent state of emergency. In this relation, it has to be reminded that independently of a formal declaration, the situation of underdevelopment in sub-Saharan Africa was frequently defined in terms of a state of emergency. Even legal scholars have included underdevelopment among the situations giving rise to a state of emergency.¹⁷⁵ However, such an approach seems not only dangerous but also unconvincing from a legal point of view. On the one hand, it is true that development is a condition for the full realisation of fundamental rights and freedoms as recognised by both the Commission on Human Rights¹⁷⁶ and the UN General Assembly.¹⁷⁷ On the other hand, framing the sub-Saharan African condition as a state of emergency would legitimate a derogation from human rights for which the constraints and guarantees provided for by both constitutional and international law in cases of a formally declared state of emergency could not operate.¹⁷⁸ The risk is therefore that the decision on both the extent and the duration of the derogation is left completely in the hands of the executive. Moreover, one of the fundamental characteristics for a state of emergency is absent, in other words, its temporary character. Underdevelopment is a structural situation and not a temporary economic crisis for which a state of emergency can be declared.¹⁷⁹

The pluralistic social composition of sub-Saharan Africa was the other structural argument used to justify the constraints on civil and political rights. It was emphasised that the presence of different tribal, ethnic, linguistic and religious groups living within the

¹⁷⁴ Kaunda was very clear in this regard. In the "Watershed Speech" he defined the role of the press as "to promote humanist moral and cultural values" and argued that journalists should be "entirely committed to the philosophy of the revolution"; K. Kaunda, *The Watershed Speech*, Address to the National Council of the United Independence Party, June 30, 1975, Lusaka, p. 27, quoted in R. C. Moore, *The Political Reality of the Freedom of the Press in Zambia*, University Press of America, London, 1992. Concrete obstacles also existed to the enjoyment of this freedom. In Zambia, the two national newspapers, the Times of Zambia and the Daily Mail, were owned by the government, as well as the radio and television. The only independent newspaper was the National Mirror established by an organisation of Christian churches.

¹⁷⁵ See S.P. Marks, "Principles and Norms of Human Rights Applicable in Emergency Situations: Underdevelopment, Catastrophes and Armed Conflicts", in K. Vasak and P. Alston, *The International Dimension of Human Rights*, Greenwood Press, Westport, 1982, p. 175 seq.

¹⁷⁶ The Commission committed itself to also take into consideration "the effects of the existing unjust international economic order on the economies of the developing countries, and the obstacle that this represents for the implementation of human rights and fundamental freedoms"; Commission Resolution 6 (XXXVI) quoted in *ibidem*, p. 181.

¹⁷⁷ The UN General Assembly stated in 1977 that "[t]he full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible; the achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development". General Assembly Resolution 32/130 of 16 December 1977, para. (b), quoted in Marks, Principles, cit., p. 181.

¹⁷⁸ As Marks himself recognises: "... how, in the absence of reliable indicators and competent bodies, one can judge whether these conditions have been met or the emergency situation ended?"; *ibidem*, p. 185.

¹⁷⁹ See J. Oraa, *Human Rights in States of Emergency in International Law*, Clarendon Press, Oxford, 1992, p. 31.

artificial borders created by colonialism and maintained by the independent African states meant that every effort was needed to ensure a sense of national identity which is necessary for the survival of African states. On the basis of this assumption, it was argued that the recognition of the freedom to form political parties, speech, and the press could be detrimental to the formation of such a consciousness because these freedoms can be exerted by the different groups with the purpose of imposing their particularistic claims.¹⁸⁰

The other argument elaborated to support the limitations of civil and political rights was the specificity of African culture. As Hyden has put it "[t]he first couple of decades of independence in African states were understandably characterised by a search for a new identity - one that gave countries back some of their "Africanness".¹⁸¹ Leaders such as Kwame Nkrumah, Sekou Touré and Julius Nyerere challenged the suitability of the human rights culture for Africa as it was born in the West. They claimed that Africa had to retrieve its own "authentic" values, especially the conception of freedom. The cultural argument invoked in the construction of an African human rights conception was specifically linked to the consideration that the human rights ideal rooted in the liberal philosophy was based on the perception of the status of the individual which was not shared by Africans. The liberal human rights conception is built on the belief of the inherent value and autonomy of each individual. Conversely, African societies are founded on a communitarian ideal according to which the individual has no importance as such, but achieves his or her personhood only by belonging to a certain group and by fulfilling his or her obligations to the group. This ideal is complemented by other two components: the consensual-based decision-making processes and the redistributive and non-profit-oriented economies.¹⁸² In the light of this, it was assumed that an African human rights system consistent with African culture cannot be modelled on the idea of the centrality of the individual and, consequently, that civil and political rights cannot be perceived as fundamental in the African mentality. In particular, the restriction of freedom of thought, opinion and assembly and free and fair elections was justified on the basis of a particular feature of African culture which was the consensual character of the traditional decision-making process. The supporters of the idea of a

¹⁸⁰ See the opinion of Julius Nyerere, former President of Tanzania, expressed in 1966: "where there is one party, and that party is identified with the nation as a whole, the foundations of democracy are firmer than they can ever be where you have two or more parties, each representing only one section of the community". J.K. Nyerere, *Freedom and Unity*, Oxford University Press, Dar-es-Salaam, 1966, p. 196.

¹⁸¹ G. Hyden, "The Challenges of Domesticating Freedom in Africa: A Right Long Overlooked", in R. Cohen, G. Hyden, W.P. Nagan (eds.), *Human Rights and Governance in Africa*, University Press of Florida, Gainesville, 1988, p. 261.

¹⁸² See R. Howard, "Is There an African Concept of Human Rights?", in R.J. Vincent (ed.), *Foreign Policy and Human Rights*, Cambridge University Press, Cambridge, 1986, p. 13.

distinctive African approach to human rights stressed that in Africa, decisions are taken unanimously after an open discussion involving the chiefs and the elders of the community. Consequently, it was argued that a state model based on a competitive relationship between the government and the citizens was completely alien to African philosophy. On the basis of this reasoning, the one-party model was presented as more suitable to both African needs and political tradition. Furthermore, it was claimed that this system was simply another form of democracy, alternative to the Western multi-party one. This represents the most challenging aspect of this debate. In this way, it was argued, that open discussion was guaranteed within the single party which represents the nation, or in other words the community.¹⁸³

All of the above arguments refer to an African structural or cultural distinctiveness. Until the collapse of the Soviet Union, some countries used the Marxist doctrine to justify the rejection of the liberal conception of liberties. The idea that rights are bourgeois "inventions"¹⁸⁴ created to protect class interests indeed represented a convenient ideological foundation on which some African states could claim the legitimacy of their practices in the field of human rights.

This latter observation indicates how the constitutional developments concerning human rights are strictly linked to the political system in force. In this respect, sub-Saharan Africa was dominated by one-party states, military regimes and systems with a Marxist-Leninist orientation until the democratisation wave which started at the end of the 1980s. Therefore the following chapters will examine the impact of the three political systems on the conception of human rights, their constitutional status and their effective implementation.

¹⁸³ See P.F. Nursey-Bray, "The Polis, The African Traditional Community and African Natural Law", in A.A. Mazrui and H.H. Palatel (eds.), *Africa in World Affairs: The Next Thirty Years*, Third Press, New York, 1973, p. 33.

¹⁸⁴ Hyden, *The Challenges*, cit., p. 261. See also Y. Boundel, *Human Rights and Comparative Politics* Adelshot, Dartmouth, 1997, pp. 16-17.

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CHAPTER 4: The One-Party System and the Role of the Judiciary: The Case of Zambia

Until the democratisation wave began in 1989, the political system which dominated sub-Saharan Africa was the single-party system.¹⁸⁵ Its introduction represented a dramatic shift with respect to the constitutional patterns adopted at the time of independence when all of the sub-Saharan African states had adopted constitutions inspired by the liberal-democratic model of the European states by whom they had been colonised.

By using Zambia as a case study, this chapter explores the impact of the establishment of the single-party system on the status of human rights in sub-Saharan Africa at both a theoretical and a practical level. To this end, a review of the spread of the single-party system in the region will be carried out, attempting to reconstruct a theory of the African single-party system with specific reference to the understanding of human rights. The chapter will then focus on Zambia, surveying the processes leading to the establishment of the one-party system, the regime of human rights in the constitutional system and the judiciary's attitude when called upon to enforce fundamental rights and freedoms. On the basis of the survey of the Zambian experience, the question of whether the one-party system can be considered compatible with the protection of human rights will be addressed.

4.1 One-Party States in Sub-Saharan Africa

A few years after their independence, the majority of sub-Saharan African states opted for the establishment of single-party systems.¹⁸⁶ Botswana, Gambia (until the military coup d'état in 1994), Senegal, Zimbabwe and Mauritius continued to be among the only multi-party states.

¹⁸⁵ On the single-party system in sub-Saharan Africa, see J.S. Coleman and C.G. Rosberg, *Political Parties and National Integration in Tropical Africa*, University of California Press, Berkeley, 1970; W. Tordoff, *Government and Politics in Africa*, Macmillan Press Ltd, London, 1984, pp. 113-144; D-G. Lavroff, "Le statut des partis politiques", in Conac, *Les Institutions*, cit., 1979, pp. 210-222; P.-F. Gonidec, *Les Systèmes Politiques Africains*, L.G.D.J., Paris, 1974, deuxième partie, pp. 28-49.

¹⁸⁶ In this regard, there is a difference between the experience of French-speaking and that of English-speaking Africa. In Francophone Africa, this system emerged almost immediately after independence in a spontaneous way (with some exceptions such as Cameroon, Chad, Gabon and Togo where electoral fraud and force were used to establish one-party rule). The electoral system, which was in force in most of the former French colonies facilitated one party to dominate the political arena. The election of the members of the National Assembly was effected on the basis of a composite national list and therefore the party, which obtained the majority of the votes also obtained all of the seats in the Assembly. This system discouraged minorities parties to compete. In English-speaking Africa, conversely, the establishment of the one-party regime was more gradual and when it did not take place through constitutional institutionalisation, it was the outcome of the banning of the opposition party (see for example Kenya or Uganda) or the merging of parties determined by a climate which was hostile to any opposition. Two alternative paths were taken in these cases: either they joined the ruling party or had recourse to violence in order to gain power. A particular case in the Anglophone African context can be found in Tanzania where TANU was virtually unopposed since 1959.

Some countries were *de iure* one-party regimes,¹⁸⁷ having legally or constitutionally institutionalised the single-party system. Others were *de facto* one-party states. Even military regimes created by coups d'état tended to legitimise themselves by setting up single parties.

Beyond the specific ideologies which the sub-Saharan African one-party states might have formulated,¹⁸⁸ there are some common assumptions behind the phenomenon of the single-party model which were explored in Chapter 3 and which could be seen as developing a theory of African one-party system. This theory was based on the assumption that the freedoms restricted at state level could be fully enjoyed within the Party. In fact, in formal terms, the introduction of this new political system did not entail significant changes in the constitutional provisions on the protection of human rights. The recognition of fundamental rights and freedoms in the bills of rights or in the preamble of the constitutions was generally retained with the emphasis on civil and political rights. Indeed, there were only a few constitutions which did not include provisions specifically protecting fundamental rights and freedoms after the establishment of one-party systems. The claim that the one-party system was compatible with human rights was ambiguous as it recognised that certain rights are necessarily suppressed by the denial of multi-partism. On the other hand, this acknowledgement was counterbalanced by the assertion that the freedoms restricted at state level could be fully enjoyed within the party.

Despite this allegation, the very nature of this system, originating with the denial of the freedom of association, as well as its ideology and the type of state organisation which it entailed, had a clear impact on the status of civil and political liberties. The study of the Zambian experience will illustrate the impact that this kind of political system had on the actual protection of fundamental rights and freedoms. Zambia is an interesting case study as it was a *de iure* one-party state from 1972 to 1991 with a constitution embodying a Bill of Rights of liberal inspiration. As the presence of the Bill of Rights shows, the introduction of the single-party system in Zambia was accompanied by a general assertion, referred to above,

¹⁸⁷ In English-speaking Africa, this was the case of Ghana (see Article 1A of the amended 1964 Constitution), Tanzania (see Article 3(1) of the 1965 Interim Constitution), Malawi (see section 4(1)(2) of the 1966 Constitution), Zambia (Article 12 A of the amended 1964 Constitution and afterwards Article 4 of the 1973 Constitution), Sierra Leone (see 1978 Constitution), Kenya (see Constitution of 1982). After the establishment of the one-party system, these countries adopted new constitutions, with the exception of Ghana which merely amended the 1964 Constitution. Kenya became a *de iure* one-party state in 1982. In French-speaking Africa, the *de iure* single-party states were Central Africa (see Article 13 of the Constitution of 1966), Congo (see Article 2 of the Constitution of 1973), Mali (see Article 5 of the Constitution of 1974), Mauritania (see Article 9 of the Constitution of 1961) and Chad (see Constitution of 1965).

¹⁸⁸ For example humanism in Zambia, African socialism in Kenya or "*ujamaa*" in Tanzania.

that this system was not at odds with the protection of human rights – including civil and political rights.

4.2 Zambia: The 1973 One-Party Constitution

The study of the one-party Constitution is divided into two parts, the first dealing with the political and constitutional processes leading to the adoption of the constitution and the second with the text of the constitution. The investigation of the process is made with the aim of assessing how the constitutionalisation of the single-party system was presented and justified in respect to the issue of the protection of human rights by the Zambian leadership and how it was perceived by Zambian civil society. The survey of the content of the 1973 Constitution will be focused on the status of human rights in the new political system.

4.2.1 The Process Leading to the Introduction of the Single-Party System

The single-party system was formally introduced in Zambia in 1972 by constitutional amendment,¹⁸⁹ which was preceded by the announcement on 25th February by President Kaunda that the Cabinet had decided that Zambia should become a “one-party participatory democracy”. This decision contradicted the commitment of Kaunda not to make Zambia a one-party state by legislative act. He was in favour of a one-party state but believed that this change could have been reached through the gradual disappearance of the opposition due to its electoral losses.¹⁹⁰

Unlike Tanzania, the Zambian political landscape was pluralistic. Since the nationalist struggle, there had been two main political actors, the United National Independence Party (UNIP) and the African National Congress (ANC) led by Harry Nkumbula.¹⁹¹ In 1966, another party was created, which was called the United Party under the leadership of a former UNIP minister, Mundia. This party was banned in 1968. Therefore, the only opposition party was the African National Congress, which in the early years of independence seemed destined to disappear because of the decrease in electoral support.¹⁹² At the general election in 1968,

¹⁸⁹ Constitutional Amendment (No. 5) Act of 1972.

¹⁹⁰ This commitment was expressed on different occasions by Kaunda; see Zimba, *The Zambian*, cit., pp. 152-153 and ft. 8 p. 258. Kaunda expressed this commitment also in his work *A Humanist in Africa*, cit., pp. 105-107.

¹⁹¹ UNIP was founded by the ANC's militants in disagreement with the ANC's policy, which was judged as too moderate.

¹⁹² This belief was based on the results of the 1964 election where the UNIP obtained 56 seats, while the ANC obtained 8. The National Progressive Party (NPP), the party of the European settlers, obtained 10 seats on the reserved European roll. The NPP was dissolved in 1968.

however, the ANC made significant advances,¹⁹³ even prevailing in the Western province,¹⁹⁴ which was traditionally pro-UNIP.

Apart from the electoral successes of the ANC, another threat to the UNIP's predominance came with the formation of another party in 1971, the United Progressive Party (UPP). This was founded by eminent figures of the UNIP and of the Zambian nationalist struggle, including the Vice-President Simon Hwansa Kapwepwe. In addition, the UPP enjoyed the support of the Bembas, the numerically majoritarian Zambian group, which was dominant in three provinces, Northern, Luapula, Copperbelt, and in parts of the Central Provinces, which were the economic core of the country. The situation was made even more serious for UNIP by the economic and social difficulties which faced the government.¹⁹⁵

The decision to contradict the previous commitment and to introduce a single-party system through constitutional amendment was justified by Kaunda with the widespread demands following the creation of the UPP.¹⁹⁶ Despite Kaunda's allegations, the broad mobilisation against the UPP came only from the UNIP's sympathisers and members, which can be explained by the capacity for coercion and patronage of the UNIP.¹⁹⁷ In September 1971, Kaunda gave his authorisation for the detention of the UPP's more prominent figures, among which all of its MPs except its leader, Kapwepwe, were arrested.¹⁹⁸

Following these events, on 25th February 1972, Kaunda announced that, upon the Cabinet's decision, Zambia should become a one-party democracy and that a Commission would be established to determine what "*form the one-party state should take in the context of the philosophy of humanism and participatory democracy*". The decision to introduce a single-party system was not, however, open for discussion. The Commission on the Establishment of the One-Party State,¹⁹⁹ appointed on 1st March 1972 under the chairmanship of the Vice-President Mainza Chona, was entrusted to:

"consider the changes in (a) the Constitution of the Republic of Zambia; (b) the practices and procedures of the government of the Republic; and (c) the

¹⁹³ It obtained 23 seats, against the 81 of UNIP, and turned out to be dominant in two of the eight provinces of Zambia.

¹⁹⁴ The UNIP almost disappeared here: of the eleven seats, eight went to the ANC.

¹⁹⁵ On the situation preceding the constitutional amendment see R. Molteno, "Zambia and the One-Party State", in 9 *East African Journal*, 1972, p. 6.

¹⁹⁶ These demands, and the opposition to the UPP coming from individual citizens, trade unions, local authorities, and the House of Chiefs also took the form of acts of intimidation against the supporters of the newly formed party.

¹⁹⁷ See Molteno, Zambia, cit., p. 9.

¹⁹⁸ After one month, 116 people had been detained.

¹⁹⁹ See Statutory Instrument No. 46 of 1972.

*Constitution of the United National Independence Party, necessary to bring about and establish of a One-Party participatory democracy in Zambia".*²⁰⁰

The composition of the Commission aimed to represent the widest range of Zambian civil and political society. Representatives from the UNIP, the trade unions, the churches, business and industry, the university, the security forces, the House of Chiefs and the government were present. Even the ANC's president and his deputy were appointed, however they refused to participate.²⁰¹

The Commission fulfilled its work by touring all of the provinces of the country for three months, collecting the views of the population, in both written and oral form. The debate on the Constitution was, however, rather limited as it only involved the participation of the most highly educated and, above all, as the introduction of the single-party system itself was not under debate. The Commission refused to record the positions expressed by Zambians on this issue, even though these amounted to three-quarters of the petitioners.²⁰² This data is extremely important because it shows how African civil society did not confirm the thesis sustained by its political leaders that civil and political liberties are alien to African culture when given the opportunity to express itself. By questioning the introduction of unipartism, Zambians queried the limitations to their individual civil and political freedoms showing that the idea of political opposition was not meaningless for Africans (or at least to the most educated ones).

According to the mandate given by the government, the Commission had to propose the more suitable form of the one-party system. However, in carrying out this task, it was obliged "to pay due regard and adhere to" nine principles defined as "cardinals, inviolable and built-in safeguards of the one-party participatory democracy". Among these principles, it was stated that:

*"the supremacy of the rule of law and independence of the judiciary shall continue to be maintained" and that "the fundamental rights and freedoms of the individual shall be protected as now provided under chapter III of the Constitution of the Republic of Zambia".*²⁰³

²⁰⁰ *Report of the National Commission on the Establishment of a One Party Participatory Democracy in Zambia*, Lusaka, 1972, Government Printer, Appendix 1.

²⁰¹ The ANC challenged the governmental decision to introduce a single-party system before the High Court and the Court of Appeal although ANC's petitions were dismissed. These decisions will be examined in section 3.

²⁰² The Commission reported that "[a] number of petitioners did not confine themselves strictly to the terms of reference regarding the form of the one-party democracy as such and discussed matters relating to the pros and cons of its establishment." Report of the National Commission, cit., par. 13.

²⁰³ Report of the National Commission, cit., p. ix. In regard to this, the case of Zambia differs from those of Tanzania and Malawi, both of which also set up similar Commissions. In Tanzania, the President confined

Evaluating the contradictory task of retaining the bill of rights in its present form, and at the same time drafting a one-party constitution, the Commission simply observed that

*"notwithstanding the directive in our terms of reference that fundamental rights and freedoms of the individual shall be protected as now provided for under chapter III ..., we consider that by implication those sections which gave people the freedom to form more than one political party could not be retained in the constitution".*²⁰⁴

It subsequently recommended that:

*"apart from the freedom to belong to the only political party, people be free to form and to belong to non-political associations, provided they are not prejudicial to the national interest".*²⁰⁵

There were no other comments formulated or questions raised.

However, despite such unwillingness to face the general question of the impact of the introduction of the one-party system on the enjoyment of civil and political rights (besides the right to form political parties), the Commission displayed sensitivity towards the safeguarding of human rights in specific recommendations, which was also a sign of a certain degree of independence.²⁰⁶ For example, the Commission recommended the strengthening of the guarantees for personal liberty and freedom of movement in the case of the exercise of the presidential powers of preventive detention.²⁰⁷ These recommendations were formulated taking into account that *"many petitioners made strong representations in favour of the right to personal liberty and the right to freedom of movement as enshrined in the Constitution. They criticised many aspects of the provisions relating to restrictions and detention without*

himself to indicating as a "guidance" the promotion of "national ethic" by guaranteeing the rule of law and the safeguarding of human rights. No guidance was given on the necessity to include a Bill of Rights in the one-party constitution. In Malawi, the Constitutional Committee did not receive any kind of indications. The one-party constitution-making process of Sierra Leone was, conversely, similar to that of Zambia.

²⁰⁴ Report of the National Commission, cit., para. 30 and 31.

²⁰⁵ *Report of the National Commission on the Establishment of a One-Party Participatory Democracy in Zambia; Summary of Recommendations accepted by Government*, Government Printer, Lusaka, 1972, p. 3.

²⁰⁶ The Zambian Commission displayed greater independence and courage than the commissions set up in Tanzania, Malawi and Sierra Leone.

²⁰⁷ The Commission recommended that preventive detention should be confined to the cases of state of emergency; that a written statement spelling out the grounds of the detention should be given to the detainee or restrictee within ten days; that the notification of detention or restriction should be published in the government gazette within fourteen days from the beginning of the detention or restriction; that a tribunal should be established with the aim of reviewing cases of preventive detention and restriction within three months and with the power to adopt binding decisions; that the tribunal should be composed by a chairman and two other persons, one of which a lawyer, appointed by the chief justice in consultation with the President of the Republic; that detainees should be free to communicate with their lawyers; that in case the state of emergency was declared when the parliament was not in session or was dissolved, it should be convened within twenty-eight days from the day of the proclamation of the state of emergency; finally that a state of emergency would cease its effects after six months from its proclamation unless its continuation was approved by the parliament.

trial".²⁰⁸ This reaction on the part of the people shows the educational value of the bill of rights. As has been remarked, "[w]hen a similar exercise took place in Tanganyika- a country which had never a bill of rights- there was no comparable clamour for fundamental freedoms of the individuals. The Zambian Bill has endeared itself to a people that are to a large extent largely unsophisticated".²⁰⁹ However, these recommendations were rejected by the government, who explained that "*at this stage in the nation's development and in view of Zambia's geo-political position in Southern Africa these recommendation could not be implemented without detriment to Zambia's security and sovereignty*".²¹⁰ In this way, development was a priority to which also individual rights were subordinated. Moreover, Kaunda could justify his refusal by citing Zambia's support for the African liberation movements of South Africa, Rhodesia, Mozambique and Angola, which made it a target of economic and military retaliation by the respective colonial governments.

Another recommendation of the Commission which aimed to enhance the protection of human rights, was the reintroduction of the special procedure for the amendment of the bill of rights, which was originally provided in the 1964 Constitution and changed in 1969.²¹¹ According to the special procedure, the alteration of Chapter III had to firstly be approved by a two-thirds parliamentary majority and then by a referendum. With the 1969 amendment, the provision for the referendum was repealed. This recommendation was also rejected by the Government, who motivated that in a one-party participatory democracy "*[t]hrough consultations at various levels by Members of Parliament and other Government and Party agencies in line with our democratic principle, the people will give the Party and hence the National Assembly power to exercise responsibilities on their behalf*".²¹² In sum, it is asserted that decisions on human rights are left to the Party because the Party represents the whole people.²¹³

²⁰⁸ Summary of Recommendations, cit., para. 32

²⁰⁹ S.V. Mubako, "Fundamental Rights and Judicial Review: The Zambian Experience", in 2 *Zimbabwean Law Review*, 1984, p. 115.

²¹⁰ See *Government White Paper*, No. 1, 1972, p. 3.

²¹¹ Constitutional Amendment (Act) No. 3 of 1969.

²¹² Summary of Recommendations, cit., p. 12.

²¹³ Nyerere also theorised on this issue. He postulated that the rationale behind Western multi-partism is the existence of conflicting social and economic interests which the parties represent. Conversely, he argued, in Africa this element of division is not present: there are no class cleavages and political parties are the product of a common struggle, i.e. the struggle against colonialism. From here, the artificiality of a plurality of parties in Africa; see J.K. Nyerere, *Democracy and the Party System*, Dar es Salaam, 1962.

4.2.2 The Constitutional Protection of Human Rights in the 1973 One-Party Constitution

The Constitutional Amendment (Act) No. 5 of 1972 inserted a new Chapter III A in the 1964 Constitution, entitled the "One Political Party".²¹⁴ Article 12A stated that (1):

"[t]here shall be one and only one political party in Zambia, namely, the United National Independence Party ..."; (2) Every citizen who complies with the requirements laid down from time to time, by the constitution of the Party shall be entitled to become a member of the Party"; (3) Nothing contained in this Constitution shall be so construed as to entitle any person to lawfully form or attempt to form any political organisation other than the Party or to belong to or assemble, associate, express opinion or do any other thing in sympathy with such political party or organisation".

Many sections of the Constitution were amended in such a way that the offices of the President, Vice-President, Ministers, Attorney-General, Speaker and Deputy Speaker and MPs had to be held by members of the single-party. If they ceased to be members of the Party, they were required also to vacate their offices or seats. In particular, the candidate to the presidency of the country was the president of the Party, appointed by the Party's General Conference,²¹⁵ and there was no temporal limit to the presidential mandate. The separation between the State and the Party was, thereby, removed. It is worth noting that this provision did not reflect the view expressed by the majority of the petitioners during the constitution-making process as they declared their preference for a system in which the president was not only elected by the people in an open contest but the candidature to the presidency was also open to every citizen. In addition, the absence of a limitation of the presidential term did not correspond to the recommendation of the Commission which stated that after two terms the president should not be eligible to stand again for a period of five years.

Furthermore, the presidential powers were enhanced. The Prime Minister, who replaced the office of Vice-President, was only vested with an advisory function to the President, who presided over cabinet meetings and had the power to appoint and dismiss ministers.

²¹⁴ The Constitutional Amendment (Act) No. 3 of 1969 made it easier for the UNIP to introduce this amendment since it was able to rely on a majority of two thirds of the members in the Assembly.

²¹⁵ The General Conference was convened every five years and was comprised of the members of the National Council, up to 600 delegates from each of the eight provinces and one delegate from each of the recognised trade unions and other organisations affiliated to the Party (Constitution of UNIP, Section 32). The National Council was formed by the members of the Central Committee, MPs, District Governors, Regional Officials, and heads of Zambian missions abroad; see S.V. Mubako, "Zambia's Single-Party Constitution - A Search for Unity and Development", in 5 *Zambia Law Journal*, 1973, p. 73.

These provisions were confirmed when a new Constitution was enacted in 1973.²¹⁶ It was almost identical to that of 1964 apart from the 1972 amendments and for the insertion of a preamble in which Zambia was defined as a "One-Party Participatory Democracy under the Philosophy of Humanism".²¹⁷ In the preamble, a significant emphasis was placed on the concept of the union of the nation, which provides a further evidence of the urgency of this concern at that time in sub-Saharan Africa.²¹⁸ An important variation with respect to the liberal constitutional model of the 1964 Constitution was the addition of a reference to individual duties in the preamble. By using the concept of "participatory democracy", the basic claim of African unipartism was immediately highlighted, in other words, that the denial of the freedom to form political parties did not lead to the suppression of democracy which would have been guaranteed by the openness of the party to all Zambian citizens and by the freedom of expression within the single party.

As for the Bill of Rights, all of the provisions contained in the 1964 Constitution were reproduced and remained unaltered. Formally, the freedoms of association and assembly (Article 23), expression (Article 22) and from discrimination on political grounds (Article 25) continued to be recognised with the same wording of the independence constitution. Their curtailment derived only indirectly from Article 4, which declared the UNIP as the only political party and prohibited the formation or attempts to form and belong to any other political party except for the UNIP.

A new institution established by the new constitution as a response to the concern provoked by the introduction of the single-party system, was the office of an ombudsman called the 'Investigator-General'.²¹⁹ The Investigator General was appointed by the President and vested with the task of investigating any matter of individual injustice or administrative abuse of power or authority on the part of state or party officials.²²⁰ However, several features of this office undermined its role of guarantee as he was obliged to investigate upon

²¹⁶ Constitution of Zambia (Act) of 25 August 1973.

²¹⁷ By referring to humanism, an attempt was made to provide the state with an ideological foundation. Humanism was, indeed, a sort of ideology, which was elaborated upon by Kaunda, and presented as alternative to both capitalism and communism, or also as a form of African socialism, purportedly inspired by Christian principles as well as African tradition. On Humanism, see K. Kaunda, *Humanism in Zambia and a Guide to Its Implementation*, Government Printer, Lusaka, Zambia, 1967.

²¹⁸ The Preamble stated: "*In pursuance of our determination to uphold our inherent and inviolable rights to decide, appoint and proclaim the means and style whereby we shall govern ourselves as a united and indivisible Sovereign State under the banner of our motto "One Zambia, One Nation".*"

²¹⁹ See Articles 117-119. The first Investigator-General was appointed in 1973.

²²⁰ The investigation could concern any persons in the service of the Republic, local authorities, party officials, officials of institutions or organisations in which the government held a majority of shares, had financial or administrative control as well as members of any commission established by the Constitution or Act of Parliament.

presidential request. Conversely, in the case of a complaint from a citizen, the decision to initiate an investigation was left to its discretion.²²¹ Moreover, any matter which related to the exercise of presidential prerogative was removed from its jurisdiction. The President also had the power to limit the Investigator General's field of investigation if he thought that the disclosure of some information would be prejudicial to national security or international relations or would concern the deliberations of the Central Committee of the Party regarding secret or confidential issues. Finally, the result of the Investigator General's investigations was communicated to the President, who had the exclusive power to decide on the necessity and possible nature of the action to take.²²² The President tended to follow the recommendations of the Investigator General, which never questioned the one-party political system.

One year after the adoption of the single-party Constitution, the Bill of Rights was amended.²²³ The provisions revised concerned the rights of detainees and restrictees. The first Assembly elected after the adoption of the single-party Constitution decided that the courts should be prohibited from making orders for damages or compensation "*in respect of anything done under or in execution of any restriction of detention order signed by the President*" unless the claim for damages or compensation arose from physical or mental ill-treatment or any error in the identity of the person restricted or detained.²²⁴ However, the tribunal which reviewed the case of a restricted or detained person was entitled to recommend to the President the payment of a compensation if it found that the person had suffered loss or damage as a result of anything done under or in the execution of a restriction or detention order signed by the President. The President was not, however, bound by the tribunal's recommendation. This amendment was a response to the trend among the courts in the period from 1966-1974 to confer damages of a considerable amount for procedural errors. In fact, it constituted not only a limitation on the rights of individuals under detention or restriction but also a constraint on the judiciary's institutional role of enforcement of fundamental rights. It is important to take into account that this amendment was in direct opposition to the suggestions of the Zambian petitioners during the tour of the Commission, which had asked for a reform

²²¹ Investigation Act, No. 23 of 1974. Judicial remedies had to be exhausted before presenting complaints to the Attorney General.

²²² Before Zambia, Tanzania had already envisaged a form of ombudsman with the Permanent Commission of Enquiry (PCE) in the 1965 Interim Constitution (s. 67(4)), before which individuals could present complaints of abuse of power by government or party officials or other public officials. The PCE consisted of a chairman and four other persons appointed by the President. The main difference between the Tanzanian and the Zambian ombudsman is that in Tanzania, the PCE was also allowed to start an enquiry on its own initiative.

²²³ Constitutional Amendment (Act) No. 18 of 1974.

²²⁴ Article 4(b) amending Article 29.

giving better protection to individuals under preventive detention. Furthermore, the bill was strongly criticised when it was presented. Opposition was widespread and came not only from civil society organisations and individual citizens who expressed their discontent through the press but also from members of the Assembly.²²⁵ With the same Amendment Act, Article 18 on the right to property was also amended. In 1969, the Zambian leadership, which was no longer subject to British conditionalities of the period preceding independence, intervened to make expropriation easier. To this end, the provision, which guaranteed that in the case of the deprivation of property a "prompt and adequate compensation" had to be paid, was cancelled. Under the amendment, the compensation would be determined by the National Assembly, whose decisions could not "be called into question in any court on the grounds that such compensation is not adequate". Due to this amendment, the Zambian government was able to acquire the property of land and mines throughout the country without excessive expense.

A final amendment to the Constitution which affected the actual enjoyment of human rights was made in 1975.²²⁶ This created an institutional framework in which the exercise of civil and political rights became even more difficult. The amendment at issue marked, in fact, the constitutionalisation of the principle of "party supremacy".²²⁷ This was realised by an amendment to Article 4, which stated: "*There shall be one and only one political party or organisation in Zambia, namely the United National Independence Party ..., the Constitution whereof is annexed for information*". Following the 1975 amendment, the last phrase was deleted and "[w]here any reference to the Constitution of the Party is necessary for the purpose of interpreting or construing any provision of this Constitution or any written law or

²²⁵ Due to this opposition, the original amendment bill was withdrawn. Initially, it removed from the courts also the power to adjudicate on the legality of the detention. On the Constitution of Zambia (Amendment) Act No. 18 of 1974, see L. Zimba, "The Constitution of Zambia (Amendment) Act No. 18 of 1974", in 10 *Zambia Law Journal*, 1978, p. 86. In reality, a first curtailment of the guarantees for individuals under preventive detention had already been made in 1969 by Constitution (Amendment) Act no. 33 of 1969. This raised from five to fourteen the days after the commencement of the detention or restriction within which the grounds for detention or restriction had to be provided for and from fourteen days to one month the time for publishing in the Gazette the notification of the detention or restriction. In addition, the detainees were deprived of the right to have their detention or restriction reviewed after six months and then at further intervals of six months. Following the amendment, the review was subordinated to an explicit request of the detainee or restrictee and to the precondition that one year from the beginning of the detention had passed.

²²⁶ Constitutional Amendment (Act) No. 22 of 1975.

²²⁷ This amendment was preceded and in a sense pre-announced by the speech of Kaunda known as the "Watershed" speech given before the National Council of UNIP in July 1975. On that occasion, Kaunda declared: "*The United National Independence Party is supreme over all institutions in our land. Its supremacy must not be theoretical nor is it enough to merely reduce it to a constitutional provision*"; see the "Watershed" Speech by President Kaunda to the National Council of UNIP, 30th June-3rd July 1975, Government Printer, Lusaka, 1975, p. 3 quoted in L. Zimba, "The Constitution of Zambia (Amendment) Act, No. 22 of 1975: The Legal Recognition of the Principle of 'Party Supremacy' in Zambia", 12 *Zambia Law Journal* 1980, p. 67. Following this speech, the National Council of the Party passed a resolution where it declared the need for an amendment so that the Constitution formalised the supremacy of the party defined as "*the sole custodian of the people's interests*".

for any other purpose, the text of the Constitution of the Party annexed hereto, together with such amendments as may from time to time be made thereto by the Party and published in the Gazette, shall be taken to be the sole authentic text of the Constitution of the Party" was added.²²⁸ By virtue of this provision, the Constitution of the Party had acquired a constitutional relevance and furthermore became an instrument for the interpretation of the Constitution.

The amendment of other provisions made the supremacy of the party more concrete. The Party's organs were not only institutionalised by vesting on them responsibilities in the decision and implementation of state policy, but their supremacy over state institutions was also sanctioned. The Central Committee of the Party was vested with the task of formulating government policy and advising the President on government and party policy. In addition, where a decision of the Central Committee was in conflict with a decision of the Cabinet, the decision of the Central Committee prevailed.²²⁹ Therefore, the Central Committee was, in effect, the real policy-maker. The office of Secretary-General of the Party was also institutionalised. After the 1975 constitutional amendment, the President was obliged to consult not only the Prime Minister, but also the Secretary-General of the Party, on the appointment and removal of Ministers, the Attorney General and other senior government officers. Consequently, the Secretary General became the second-ranking official in the state instead of the Prime Minister. Furthermore, along with the members of the Cabinet, the Central Committee of the Party was entitled to raise the question of the mental or physical capacity of the President to discharge his functions and therefore, to provoke his removal. As for the person entrusted with the task of taking over the functions of the removed President, the 1973 Constitution had already attributed this to the Secretary-General of the Party or, in his absence, to a Central Committee member nominated for this purpose.²³⁰ The 1975 amendment merely added that the person who exerted the presidential functions was required to act upon the advice of the Cabinet and of the Central Committee of the Party. Thus, the fusion between the state and the party had been completed.

²²⁸ S. 2(b)(3) of the Constitution of Zambia (Amendment) Act No. 22 of 1975.

²²⁹ Section 47(c)(2) of the Constitution.

²³⁰ Section 40(3).

4.2.3 Justification for the Establishment of a One-Party State in Zambia

During the debate on the text of the 1973 constitution, it was emphasised that the adoption of a new constitutional charter should meet the needs for an "autochthonous" constitution. In the case of Zambia, the search for autochthony had a dual purpose. Firstly, it was linked to the fact that the British Parliament was the legal source of the independence constitution. The necessity of having a document which was "home-grown",²³¹ created on their own soil, and not imported from the United Kingdom" was felt. Obviously, the considerations relating to the content of the constitution were also at stake. The need to have a document which was, as Vice-President Chona stated, "*more suited to our own conditions*" and "*more pertinent to the aspiration of our people*" was also highlighted.²³² The conditions were described as follows. Firstly, Kaunda justified the introduction of a one-party system in Zambia by citing the "constant demand" which had been coming from the population since independence. In reality, however, as described in section 2.1, this demand only came from the UNIP's supporters. Moreover, the argument relating to the artificiality of multi-partism²³³ that could have been argued in Tanzania where the TANU had virtually been the only party since independence, this was certainly not the case in Zambia where the political scene had been pluralistic since the time of the nationalist struggle.

A further condition, which was often referred to, was the multiethnic composition of Zambia. Multi-partism was depicted as a threat to national unity since Zambian society is composed of seventy-three ethnic groups and both the ANC and UPP parties obtained their support among specific groups – such as the Lozi and Ila-Tonga for the ANC and the Bemba

²³¹ This position also emerges clearly from the Report of the National Commission, cit., at par. 16 where it was stated that "*with the establishment of the one-party participatory democracy, Zambia should no longer be tied by the British constitutional provisions*". The enactment of the new constitution was accompanied by the repeal of the Zambian Independence Act and the Zambian Independence Order, which constituted one document with the Zambian Constitution of 1964. See K.C. Wheare, *The Constitutional Structure of the Commonwealth*, Clarendon Press, Oxford, 1966.

²³² National Assembly Debates, Hansard, No. 33, 4th July – 30th August, 1973, Col. 87, quoted in Zimba, *The Zambian*, cit., p. 156. With more rhetoric, Kaunda expressed the same concept in his work *A Humanist in Africa*: "*I thought my reference to the one-party state would get a rise out of you! I know that anyone conditioned to the democratic system as it operates in Great Britain or the United States tends to detect an ominous undertone in the very sound of the term. But if we are to make sense of contemporary Africa, we must escape from the strait-jacket of our preconceptions and have the charity to assume that where the political systems of African States diverge from those of the ex-metropolitan power this is not necessarily due to the pique or hunger for novelty; it may be that we have our own ideas about what is best for our people. The trouble is that Britain exported to the African continent the Westminster Model, a system refined and polished over many centuries, and is utterly unable to believe that any sane African Government would wish to deviate from it. But difficult though it may be for devotees of the Westminster Model is not so much the finest flower of democratic systems as a beautiful anachronism—a pattern ideally suited to the genius of the British people but of limited value, without drastic modifications, in modern Africa*". Kaunda, *A Humanist*, cit., pp. 105-106.

²³³ Press Conference on 25th February 1972 quoted in Zimba, *The Zambian*, cit., p. 153.

for the UPP - instead of among Zambians at large. Their campaigns were addressed precisely to those groups.

An additional justification for the option for unipartism was the conflicting relation between Zambia and the racist regimes of South Africa and Rhodesia and with the Portuguese colonies of Mozambique and Angola, in light of the support given to the African liberation movements of these countries. To face the problems posed by ethnic rivalries and external enemies, the governmental action could not, it was held, be hampered by the Western-style lengthy democratic process centred on a confrontation between the government and the opposition. The primary argument for this position was that the situation which Zambia and sub-Saharan Africa faced was comparable to that of a state of emergency, where it was legitimate to impose derogation from individual liberties in the interests of the collectivity. From this it followed that

"[t]here is not time for endless debate and arguing ... Inevitably, therefore, the Legislature ceases to be the major focus of power. It is not unimportant as a forum of national debate and a sounding board of public opinion. But most leaders in the new Africa find themselves having to take initiatives and formulate policies which in the older societies of the West would emerge from somewhat leisurely process of parliamentary debate".²³⁴

Kaunda went further and stated that *"[h]ard though it may sound, in my way, survival is more important than freedom of expression... National survival is the basic good; all other qualities such as unlimited freedom of expression are contingent upon it. The great enemy of freedom is not totalitarianism but chaos".²³⁵* The above quote highlights the core rationale for unipartism and the limitation of the rights linked to the functioning of a multiparty liberal democracy: the priority of the national interest over the rights through which individuals may show their opposition to the executive, which is imposed by the necessity to respond adequately to a state of "emergency".

²³⁴ Kaunda, *A Humanist*, cit., pp. 108-109.

²³⁵ *Ibidem*, p. 108.

4.3 A Survey on the Zambian Human Rights Case Law²³⁶

The examination of the decisions handed down by the High Court and by the Court of Appeal of Zambia under Section 28 of the Constitution²³⁷ is essential to understanding the conception and actual status of human rights in Zambia under the one-party regime.²³⁸ More notably, this analysis helps us to grasp the extent to which the human rights discourse advanced by the political class was shared and supported by the judiciary.

The number of cases brought before the judiciary regarding the alleged violation of fundamental rights and freedoms was not very significant. The majority concerned the right to personal liberty and arose from measures of preventive detention. The judiciary, however, was also used to fight political battles. Among the few cases regarding the violation of human rights other than personal liberty was the *Nkumbula case*,²³⁹ which had a central place in Zambian constitutional and political history. This case arose from a claim for redress by the leader of the African National Congress before the High Court after the government announced its intention to establish a one-party system in Zambia. Nkumbula claimed that such an announcement and the appointment of the Commission, which was given the task to make recommendations for the new system, were likely to contravene the rights guaranteed by Sections 13, 23 and 24 of the 1964 Constitution protecting the freedom from discrimination on political grounds, to assembly and association, expression; or that it was contrary to the spirit of the Constitution. The petitioner firstly asked for a declaration attesting that the Commission was bound to adhere to the principle that the fundamental rights and freedoms of the individual should continue to be protected as provided under Chapter 3 of the 1964 Constitution meant that Section 23 should remain unchanged. This implied maintaining provisions for the guarantee of the freedom of assembly and association, which encompasses also the freedom to form political parties. Therefore, the petitioner asked the Court to declare that the Commission should hear evidence against the establishment of a single party system. The Chief Justice, however, refused to issue such a declaration and found that this did not constitute a breach of individual freedoms. He stated that, "[q]uite clearly, s. 23 in its existing form would be inconsistent with the notion of one-party state in that at present it guarantees freedom of association, including by implication power to form political parties". He added

²³⁶ The present survey covers decisions taken until 1984.

²³⁷ Section 28: "... if any person alleges that any of the provisions of sections 13 to 26 (inclusive) of this Constitution has been or is likely to be contravened in relation to him, then, without prejudice to any other action which is lawfully available, that person may apply to the High court for redress".

²³⁸ For a collection of the cases on fundamental rights and freedoms in Zambia from independence until 1984, see M. Ndulo and K. Turner, *Civil Liberty Cases in Zambia*, The African Law Reports, Oxford, 1984.

²³⁹ 1972 S.J.Z., p. 40.

that the term of reference to which the applicant referred, i.e. the maintenance of Chapter 3 in a one-party state, was to be considered as *"merely a guiding factor in considering the form of a one-party state"* and consequently, it did not necessarily follow that *"s. 23 must be rigidly adhered to in its present form"*. Moreover, it was outside the terms of reference of the Commission that witnesses could be heard on the issue of the establishment of a one-party state. According to the Court, the inability of the citizens to express their views did not constitute a limitation of their freedom.

Nkumbula also asked for a second declaration that any statement inhibiting any expression of opinion against the establishment of a one-party system was in contravention of the spirit of the Constitution and, in particular, of Sections 13, 22 and 23. In this instance, the petitioner was referring to the statement of the district governor of Lusaka, Mr. Justin Kabwe, who said that "UNIP was ready to crush anyone who opposed the formation of a one-party state" and that "whether people liked it or not, the one-party democracy had to come to stay in Zambia". The Chief Justice replied that this statement could not be considered as representative of the government's policy. Moreover, according to the Justice, *"[t]he evidence shows that the petitioner has freely expressed his opinion against a One-Party State"*. The restrictive understanding of the freedom of expression held by the Chief Justice can be clearly seen from the following: *"The petitioner is at liberty to put forward his views in public or in private. That he cannot put them forward before a particular Commission set up to deal with other matters is no restriction upon this freedom"*.

Furthermore, Nkumbula requested the Court to state in the third declaration that the introduction of the one-party state was contrary to the spirit of the Constitution and to the rights guaranteed under Sections 13 and 23. The Chief Justice also rejected this request due to the fact that this situation had not yet occurred, although it was highly probable that this would be the outcome of the amendment. He argued, *"I have no doubt that the introduction of a One-Party State will prohibit the formation of political parties, and that it will be a restriction on the present right of assembly contained in s. 23. In that sense it is inconsistent with the present Constitution."* However, *"[t]here is no evidence that under the Constitution, as it at present exists, any action will be taken to prevent the formation of political parties. It is only when the Constitution has been amended – and this will involve an alteration to s. 23 restricting rights of assembly by different political parties – that any interference will take place with the petitioner"*. The reasoning of the Court was inspired by the logic of narrow formalism. The Court argued that the government was entitled to amend the Constitution, including the Bill of Rights, and furthermore that the mere declaration of such an intention

could not be challenged. In addition, once the amendment had taken place, there would not have been any infringement of the right of association because this would have no longer been protected by the constitution.²⁴⁰

Nkumbula presented an appeal (*Nkumbula v Attorney General*)²⁴¹ against the decision of the High Court. There were two grounds upon which the appeal was based. The first was that the appointment of the Commission of Inquiry was *ultra vires* and null and void because the matters to be inquired into could not be considered 'for the public welfare' as required by the Inquiry Act under which the Commission was appointed.²⁴² The appellant remarked that the deprivation of the citizens of the fundamental rights and freedoms could not be considered for the public welfare. The Court observed that the power of the President to make such a decision could only be challenged on the ground that he acted "in bad faith or from improper motives or on extraneous consideration or under a view of facts or law which could not reasonably be entertained".

However, the central issue involved the actual interpretation of the concept of 'public welfare'. On the one hand, the appellant maintained that "the public welfare means the welfare of the individuals comprising the public, and ... to derogate from individual rights and freedoms cannot be for their welfare." On the other hand, the Court replied that "[t]he ordinary meaning of 'the public' is the community in general, as an aggregate, the people as a whole". This confrontation between Nkumbula and the Court of Appeal summarises the more general conflict underlying the introduction of the one party-system in sub-Saharan Africa. The clash is between two different ways of perceiving the relationship between the public interest and individuals' rights. The appellant believed that the common good should not be referred to as an abstract entity but as to the sum of the individuals constituting a society and, more specifically, that their interest can only be fulfilled if their individual rights are respected²⁴³ and that when a conflict arises between the interest of society at large in the area of individual rights and freedoms, the latter must prevail. Conversely, the Court of Appeal viewed the relationship of the public interest and fundamental rights as between two

²⁴⁰ The Court terminated saying that "[w]hen the Constitution is amended, that will be a different matter and his rights will be such as provided in that new Constitution".

²⁴¹ HP/CONST/Ref./1/1972, of April 1972.

²⁴² Section 2(1) of the Inquiries Act (Cap. 181) states: "The President was entitled to appoint a commission "to inquire into any matter in which an inquiry would, in the opinion of the President, be for the *public welfare*" (emphasis added).

²⁴³ [Counsel for the applicant] argued that "although there are many areas in which the interests of the society at large and the requirements of orderly government are in conflict with the interests of individuals and lead inevitably to restrictions on the freedom of action and behaviour of individuals, where such a conflict arises in the area of individual rights and freedoms as protected by Chapter III of the Constitution the interests of the individual must prevail".

autonomous entities: the collectivity and the individuals. Within such a relationship, the Court advanced the idea of the prevalence of the former over the latter, which was the idea upon which African political leaderships built their single-party systems. This extract from the Court's decision expresses this opinion in a clear-cut way: "*... it is unthinkable to suggest that the government of a country elected to run an ordered society is not permitted to impose whatever constitutional restrictions on individual liberties it regards as necessary to enable it to govern to the best advantage for the benefit of the society as a whole ... and if the interests of the society are regarded as sufficiently important to override the individual interests, then the action in question must be held to be in the public interest or for the public benefit*".

With the second ground of appeal, Nkumbula challenged the refusal of the High Court to accept his petition for a declaration stating that the introduction of a one-party system would infringe his freedom of association under Section 23. The appellant reminded the Court that Section 28(5) allowed petitions for redress even when a right or freedom "is likely to be" infringed. Therefore, he asserted that he did not have to show that the introduction of a one-party system would infringe his rights, but simply that his right, as provided for at the time of the appeal, was likely to be infringed by the introduction of a one-party state. The Court dismissed the appeal on the ground that under Section 28(5) "*[n]o application shall be brought under clause (1) on the grounds that the provisions of Articles 13 to 27 (inclusive) are likely to be contravened by reason of proposals contained in any bill which, at the date of application, has not become a law*". This conclusion is formally correct but the appellant, recognising that a declaration by the Court would have little value if Section 23 was amended, believed that "in the area of individual rights and freedoms it would be a salutary warning to the government for the courts to say that a proposed amendment is in conflict with existing rights". The Court did not share this belief, being of the opinion that it is "*no part of the function of the courts to issue warnings to the Government as to the legality of its proposed actions*", but only to enforce or secure the enforcement of the provisions included in the Bill of Rights. In this case, however, even this function was limited. Given the fact that the government was considering an amendment to these provisions, the Court felt that under such circumstances "*if the court could ... enforce or secure the enforcement of the existing provisions this would mean that the court could prevent the amendment*".²⁴⁴

²⁴⁴ A similar case was also taken in Sierra Leone. The plaintiff alleged that the appointment by the government of a one-party committee constituted a threat to or an infringement of the rights guaranteed under Sections 12-23 and particularly the freedoms of assembly and association. The application was dismissed on the basis of arguments similar to those of the Nkumbula case. In relation to s. 24 which corresponds to the Zambian s. 28, the Chief Justice found that "*what that section means is this: to entitle a person to invoke the judicial power of*

The Nkumbula case shows how the constitution-making power was perceived as unfettered power in the African context. The Zambian judiciary rejected the idea that fundamental rights represent a restraint on the power to revise the constitution and consequently as a restraint on political power. Conversely, here the Court held that it was its duty to avoid any pronouncements which might hinder the free exercise of the amendment of the constitution by the government even when such an amendment related to the Bill of Rights. Its only concern was the procedural correctness of this revision.

Apart from the Nkumbula case, most human rights cases in Zambia related to measures of preventive detention taken under the preservation of public security regulations, which the President was entitled to adopt under a state of emergency. As seen above, a state of threatened emergency was declared in 1964 and it was prolonged until 1991 in the name of the security and economic problems deriving from the support to the African liberation movements operating in the Southern African region. Despite the formal motivation for the prolonging of the state of emergency, the use of the power of detention without trial was mostly used to silence "local political opponent than ... spies or saboteurs from Rhodesia or South Africa".²⁴⁵ Furthermore, the continuation of the state of emergency was certainly not in conformity with the principles in the matter laid down on this matter at international level by the International Covenant on Civil and Political Rights (ICCPR), which Zambia had ratified on 10th April 1984. The state of emergency under which Zambia remained until 1991 was in sharp contrast with the temporary character that it should have "by its very nature".²⁴⁶ In fact, Article 4 of the Convention does not establish any principle on the duration of the state of emergency, however the Human Rights Committee derived the principle of the necessary temporal limitation through the principle of proportionality established by Article 4, under which states may take measures derogating from their obligations under the Covenant only "to the extent strictly required by the exigencies of the situation". In this regard, Zambian state of emergency was also inconsistent with the principle that Oraa has defined as "qualitative proportionality", consisting of the instrumental link between the emergency and the measures adopted.²⁴⁷ This link was, indeed, lacking since the power vested in the executive under a

this court, that person must show by allegations of material fact in his pleadings that as a result of the legislative or executive acts complained of he has sustained, or is sustaining, or is immediately in danger of sustaining, a direct injury, and this injury, is not one of a general nature common to all members of the public"; see Steele and Others v Attorney General, in Africa Law Report, SLI, 1976, p. 1.

²⁴⁵ J.M. Mwanakatwe, *The End of Kaunda Era*, Multimedia Publications, Lusaka, p. 147.

²⁴⁶ Oraa, *Human Rights*, cit., p. 30.

²⁴⁷ *Ibidem*, pp. 146-147.

state of emergency was used not to deal with the cause of the alleged emergency, but as a tool in the internal political struggle. In addition, the principle of proportionality can also be derived from Article 30 of the Zambian Constitution, in which it stated that derogatory measures taken in a state of emergency cannot be considered as a violation of the Bill of Rights "unless it is shown that the measures taken exceeded anything which, having due regard to the circumstances prevailing at the time, could *reasonably have been thought to be required for the purpose of dealing with the situation in question*" (emphasis added). It should also not to be overlooked that the declaration of a threatened emergency is not permitted under the Covenant as the situation of emergency must be present or at least imminent. Article 4(1) of the ICCPR refers to a "public emergency which threatens the life of the nation".

Due to the *de facto* permanent state of emergency, the recourse to preventive detention was considerable over the course of Zambian history.²⁴⁸ In this sphere, the judiciary proved to be willing in many instances to declare the relevant acts invalid, although this attitude was contradicted at other times by decisions interpreting both the presidential powers and the notion of public security in a wide manner. A review of the most meaningful decisions will illustrate this dual face of the Zambian judiciary, and will demonstrate how it corresponded with an uneasy solution to the problematic relationship between the public interest and fundamental rights and freedoms.

The judiciary was often inclined to give prevalence to rights of the citizens with respect to interest of security in the name of which detention orders were taken. Thus, it based its judgments on the principle that procedural irregularities made a detention order invalid.²⁴⁹ In the cases of invalid detention orders, the applicant was often awarded considerable damages, and as it has been seen in the preceding section, this practice convinced the government of the necessity to introduce a constitutional amendment to restrict the possibility of obtaining damages for unlawful detention. The reason given by courts for conferring damages for procedural irregularities reveals their awareness of their role in the safeguarding of individual liberties. In the case of *Attorney General v Chipango* of 1971,²⁵⁰ for example,

²⁴⁸ Between March 1971 and 21st September 1981, approximately 901 detention and restriction orders were adopted, see Nwabueze, *Presidentialism*, cit., p. 341.

²⁴⁹ In most instances, the procedural irregularities which gave rise to a judicial recourse were the lack of respect of the term of 14 days to provide the detainee with the grounds of detention or the vagueness of the grounds; see *Attorney-General v Chipango* (Court of Appeal, 1971); *In Re Kapwepwe and Kaenga* (Court of Appeal, 1972); *In Re Puta* (High Court, 1973); *Attorney General V Musonda and others* (Supreme Court, 1974); *Kawimbe v Attorney General* (Supreme Court, 1974); *In Re Seegers* (High Court, 1976); *Mutale v Attorney-General* (High Court, 1976); *Sithole v Attorney-General* (High Court, 1977); *Banda (J.) v Attorney-General* (Supreme Court, 1978).

²⁵⁰ (1971) SJZ (CA).

the Court of Appeal asserted that the respect for the term of 14 day limit to furnish the detainee with the grounds of his/her detention "*is not a mere procedural step ... but it goes vitally to the fact of detention.*" In relation to the assignments of damages, the Chief Justice observed, "*I think that is a very small consequence compared to the necessity to safeguard the rights and liberties of the common man*". In the same case, at the first instance, the High Court had already granted damages to the plaintiff and justified this decision by stating that "*[t]he individual's right to personal liberty is one of the pillars of the fundamental rights and freedoms under the Constitution of the land and is clear in the minds of the Zambian people that it ought not to be allowed to pass through their fingers like quicksilver; it should be jealously guarded against any illegal encroachment from any source no matter how great or powerful*".²⁵¹

Nevertheless, the judiciary tended to uphold the position of the government especially in cases with a significant political dimension as in the case of *In Re Kapwepwe and Kaenga*,²⁵² in which the two plaintiffs were leaders of the UPP and were detained under Regulation 33 of Public Security Regulations. They alleged that the grounds of their detention were too vague. In response, the Court, firstly, supplied a definition of detailed grounds for detention.²⁵³ It, then, dismissed the appeal, by finding the grounds in compliance with its definition. The explanation reached by the Court is worthy of closer scrutiny. From its judgement, the concern of the judiciary for the ideology of the Zambian political leadership of the time is clearly visible. It supported the link between political pluralism and the threat to public security based on the perception, which did not need to be proved, that in the Zambian context, political pluralism would have led to tribalistic politics and would therefore pose a danger for public security. This was precisely one of the grounds given for the preventive detention of one of the plaintiffs. The fact that that this individual was involved in organising the UPP, was *per se* evidence that he would create tribal conflict in the country and therefore endanger its security. The Court argued that this ground was sufficiently detailed by pointing out that the UPP drew its support from "*the Bemba and allied tribes and that the party is in the popular image a Bemba party*". Given this context, the detainee was allegedly organising the party "*as a tribal party which in the result is likely to cause conflict with other tribes and prejudice security*". Facing the difficult question of whether the mere act of party membership

²⁵¹ *Chipango v Attorney-General* (High Court, 1971).

²⁵² Court of Appeal, 1972.

²⁵³ According to the Court's definition grounds "must enable the detainee to make representations not only on the basis of mistaken identity, alibi, and the like, but also of the merits; the detainee must be put in a position where he can dispute the truth of the allegations against him."

could constitute an activity endangering the security of the Republic and could be considered a sufficient ground for detention, the Chief Justice admitted that he was troubled by "*the thought of depriving of his liberty a person who it is recognised may be entirely innocent of any intention to prejudice the security of the State*". The dilemma was solved on the basis of the principle that the evaluation made by the President was unquestionable and completely discretionary. In this case, Justice Baron declared: "... *there is no onus on the detaining authority to prove any allegation beyond reasonable doubt, or indeed to any other standard or to support any suspicion. The question is one purely for his subjective satisfaction*".²⁵⁴ In considering this decision, it has also to be taken into account that the absence of a definition of public security both in the constitution and in the legislation allowed the judiciary to interpret this notion widely.²⁵⁵

In the 1980s, the Zambian judiciary displayed a change of direction by becoming more willing to evaluate the executive's behaviour in relation to detention apart from the procedural irregularities. On some occasions, the judiciary asserted its power to assess the reasonableness of the executive's decisions.²⁵⁶ Thus, nine years later, the High Court completely reversed its orientation as shown in the *In Re Kapwepwe and Kaenga* case. In the case of *In Re Waslamba and Sampa*,²⁵⁷ the Court had to rule on a case of preventive detention as a result of the alleged incitement of workers on the part of the plaintiffs to strike in the Copperbelt. Both plaintiffs were placed in detention due to declarations which, according to the charges against them, were the causes of the strikes. The Court held that there was no causal relationship between these declarations and the strike and that the plaintiffs' freedom of expression was unconstitutionally infringed because its restriction could not be considered reasonably

²⁵⁴ The same conception of the discretionary power of the President was expressed in the cases *Re Buitendag* (1972) ZR 156. In this case, the plaintiff was detained on the same grounds in respect to which he was acquitted in a trial before the High Court. Another example is the case *Maseka v Attorney-General* (unreported) High Court case HP/97 of 1979. Once again, the grounds for detention were the same used for criminal charges which were subsequently withdrawn. The only chance to overcome this obstacle would have been to demonstrate the *mala fide* of the President, which was obviously virtually impossible.

²⁵⁵ In the case *Mudenda v Attorney General* (ZR 24, 1979), the High Court stated that the definition contained in the Preservation of Public Security Act is not "exhaustive" but simply "illustrative". A similar opinion was put forward in the case *Chibwe v Attorney General* (ZR 10, 1980) where justice Sakala found that the externalisation of Zambian currency, which was the ground of detention of the plaintiff, "from a country whose economy is experiencing great difficulties is certainly prejudicial to public security, which activity if left uncontrolled would lead to certain economic consequences and hardships on the people of this country". Justice Cullinan reached different conclusions in the case *Kaira v Attorney General* (ZR 65, 1980). He found that the only type of crimes which "Parliament had in mind in the definition of Public Security as given in the Preservation of Public Security Act may lead to detention. Thus he specified that "the connection with public security cannot in itself give rise to the necessity for detention". The same conclusion was reached by J. Cullinan in *Re Kapwepwe and Kaenga*.

²⁵⁶ See *Lombe and Chisata v Attorney General* ([1981] ZR 35) and later *Chiluba v Attorney General* (1981/HN/713 (unreported)).

²⁵⁷ High Court, 1981.

required for the purpose of dealing with the existing situation as provided for by Section 26 of the Constitution. In relation to one of the plaintiffs, Mr. Sampa, the rationale for the decision illustrates that the Court's interpretation of civil rights was completely at odds with that of the political leadership. One of the reasons for Mr. Sampa's preventive detention was his declaration that there would have been a coup d'état, if the president had not changed the army personnel and that the ultimate goal of the Zambia Congress of Trade Unions (ZCTU) was to take over the leadership of the country. In this case the Court found, firstly, that the plaintiff's statements could not lead workers to strike and, secondly, that "*simply to express an ambition to take over the leadership of the country per se does not make the author of that statement a public security risk*". In this decision the Court marked in a clear way the distance between political confrontation and threat to the security of the state. This case can be seen in sharp contrast with the previous judgement, in which the mere membership of the UPP was held to be a sufficient ground for preventive detention.

The judiciary was also called upon to rule on another form of restriction of fundamental rights and freedoms apart from a declared state of emergency, which consisted of their limitation for reason of a public interest. The Zambian Constitution provided three conditions for the limitation of fundamental rights and freedoms: that it had to be provided for by law, that it had to be reasonably required in the interests of defence, public safety, public order, public morality or public health, and finally that it had to be reasonably justifiable in a democratic society. The judiciary formulated its definition of the latter two requirements on two occasions with contrasting decisions. It is important to remark that these decisions date back to the period preceding the introduction of the one-party system and show that in reality the problematic relationship between individual rights and the public interest existed before the creation of a political climate and constitutional framework unfavourable to individual rights. The first case was *Feliya Kachasu v The Attorney General for Zambia*.²⁵⁸ The case concerned a girl who was suspended from school because she refused to sing the national anthem and salute the national flag, as provided for by the Education (Primary and Secondary Schools) Regulations of 1966, because it was contrary to her beliefs as a Jehovah's Witness. She claimed that these regulations were in breach of Section 21 of the Constitution guaranteeing freedom of conscience, thought and religion. Furthermore, she requested redress on the basis of Section 28 as she claimed that the suspension constituted an infringement of the rights guaranteed by Section 21 of the Constitution. According to Section 21 the freedom

²⁵⁸ SJZ, 1967/HP/273.

of conscience, including the freedom of thought and religion, could be subject to restraints provided for by a law, if it was 'reasonably required' in the interests of defence, public safety, public order, public morality or public health and finally 'reasonably justifiable' in a democratic society. This decision is interesting in particular with regard to the definition of the concepts of 'reasonably required' and 'reasonably justified' in a democratic society. According to the applicant, the regulation and the concrete limitation of her right effected by the suspension were not reasonably required in the interest of defence, public safety or public order and the law could not be considered as reasonably justifiable in a democratic society. With regard to the requirement of 'reasonably required', the High Court found that "*bearing in mind the compelling consideration, particularly at present time, of national unity and national security, without which there can be no certainty of public safety nor guarantee of individual rights and freedoms, I think it is reasonable requirement that pupils ... in schools should sing the national anthem and salute the national flag*". The judiciary shared the government's belief that the idea that national identity was a paramount value which should be interpreted as a pre-requisite for public safety.²⁵⁹

In relation to the requirement that the law was 'reasonably justifiable' in a democratic society, the Court argued that "*[t]he criteria of what is reasonably justifiable in a democratic society might vary according to whether that society is long established or newly emergent.*" From this it went on to observe that "*Zambia is newly emergent. It would be unrealistic to apply the criteria of a long-established democratic society. We should look to the democratic society that exists in Zambia; and having found that these regulations are reasonably required in Zambia I have no hesitation in finding that they are reasonably justifiable in the democratic society that exists here*". This decision highlights, in the first place, that the concept of "reasonably justifiable in a democratic society" is relative. This understanding corresponds with the general claim made by African political leaders that there is no uniform conception of democracy and that, given its specificities, the notion of democracy which should be applied in Africa cannot be the same as in the West. In the second place, this decision held that the concept of 'reasonably required' by a public interest corresponds with that of 'reasonably justifiable', which considerably restricts the evaluation of the legitimacy of a limitation of human rights by the judiciary. By formulating the equation between reasonably

²⁵⁹ The concept of 'public safety' is rather difficult to define. It may be of assistance to refer to the literature concerning this concept as used in the ICCPR. From the discussion on Articles 18, 21 and 22 of the ICCPR, which was carried out in the Third Committee, it seems that public safety concerns "the safety of persons, to their life, bodily integrity, or health", see A.C. Kiss, "Permissible Limitations on Rights", in Henkin, *The International*, cit., p. 298.

required and reasonably justifiable in a democratic society, the latter requirement is, in fact, excluded from any assessment by the judiciary. The problem with this reasoning is that the purpose of this parameter should be to guarantee that the consideration of the public interest is not left to the complete discretion of the state. By considering political freedom and the guarantee of individual rights against the state as basic common features of a democratic society,²⁶⁰ the assessment of the justifiable limitation of a right in a democratic society should assure that this limitation is effected in the most restricted form.²⁶¹

A different opinion was subsequently adopted in the case of *Jasbai Patel v The Attorney General* case.²⁶² In this case the High Court decided that "*it is necessary to adopt the objective test of what is reasonably justifiable, not in a particular democratic society, but in any democratic society... some distinction should be made between a developed society and one which is still developing, but ... one must be able to say that there are certain minima which must be found in any society, developed or otherwise, below which it cannot go and still be entitled to be considered as a democratic society*".²⁶³ The perspective on democracy is different in this case with respect to that adopted in the previous year. This is also true for the relationship between reasonably required but this does not automatically mean that it is also reasonably justifiable in a democratic society. The Court observed that it might occur that a regulation is reasonably required but from this does not automatically derives that it is also reasonably justifiable in a democratic society. What has to be considered is the "*method*", and "*the manner in which the power ... was exercisable and in fact exercised which (is) in question*".

This review of Zambian human rights case law confirms that the main attack upon civil and political rights came from the theory that in the case of a conflict between the public interest and individual rights and freedoms priority should be given to the former. At the same time, however, it also demonstrates that the bill of rights still provided protection for the individual's rights and that, despite many constraints, the judiciary could enjoy a measure of

²⁶⁰ It is worth reminding that the ICCPR refers to "necessarily required" and not simply "justifiable in a democratic society" (see Articles 14, 21 and 22).

²⁶¹ A further aspect of this decision endangering fundamental rights and freedoms was the assertion of the principle of the presumption of the constitutionality of laws and rules made by a minister acting under the statutory powers conferred on him by the legislature. This presumption extended to the requirement that laws were necessary and reasonably justifiable.

²⁶² SJZ, 1 OF 1968.

²⁶³ The Court adopted the definition of a "democratic country" given by the U.S. Supreme Court as a "*free society in which government is based upon the consent of an informed citizenry and is dedicated to the protection of the rights of all, even the most despised minorities*" (*Speiser v Randell* (357 U.S. 513 (1958)) and as a "*free government ... that leaves the way wide open to favour, discuss, advocate, or incite causes and doctrines however obnoxious and antagonistic such views may be to the rest of us*" (*Yates v United States*, 354 U.S. 298 (1958)).

independence in this domain. Moreover, it shows how, in the absence of alternative spaces for political struggle, the bill of rights was the only means through which to challenge government action and the courts, which were entrusted with its enforcement, were used as the forum to conduct a political battle such as the fight against the introduction of unipartism.²⁶⁴ Finally, it demonstrates that the African discourse and experience of human rights, prior to the democratisation processes of the 1990s, was more complex than it may have appeared. Non-political actors offered a view on human rights which was not at all at odds with the liberal ideology, at least with regard to the one relationship between the political power and the citizen.

4.4 The Impact of the Single-Party System on the Protection of Human Rights

The introduction of a single-party system had a clear impact on human rights protection. Notwithstanding the divergences among one-party African states in respect to their human rights record, the single-party system itself proved to be incapable of safeguarding human rights.

The International Seminar on 'Human Rights, their Protection and the Rule of Law in a One-Party State' convened by the International Commission of Jurists (ICJ) in 1976 at Dar-es-Salaam can be used as a basis for a reflection on this issue.²⁶⁵ The participants at the seminar found that human rights in African single-party states were not adequately protected, however in their conclusions it was stated that, despite the obvious limitations on the freedom of association and expression, fundamental rights and freedoms can be guaranteed under a single-party system.²⁶⁶ This was, indeed, the fundamental claim put forward by the advocates of the one-party rule in sub-Saharan Africa. This was not only clear in states like Zambia where a liberal bill of rights was included in the single-party constitution, but it was also put forward by states rejecting the adoption of a bill of rights.²⁶⁷ The advocates of the one-party

²⁶⁴ This is also what happened in Kenya since the late 1980s, see Y. Ghai, "The Kenyan Bill of Rights", in P. Alston (ed.), *Promoting Human Rights Through Bill of Rights: Comparative Perspectives*, Oxford University Press, Oxford, 1999, cit., p. 230.

²⁶⁵ The participants were politicians and scholars from Tanzania, Zambia, Botswana, Lesotho, Swaziland and the United Kingdom. For a record of the Seminar see International Commission of Jurists, *Human Rights in a One-Party State*, Search Press London, London, 1976.

²⁶⁶ Ibidem, p. 108.

²⁶⁷ Daudu Mwakawago, Minister of Information and Broadcasting in Tanzania asserted at the International Commission of Jurists' Seminar on Human Rights in a One-Party State: "In Tanzania we do not have a bill of rights in the constitution; but we have embodied the elements of human rights in the party creed and the preamble to the constitution of the country. We have a one-party system, yet we have tried to ensure that there is freedom of conscience, expression and association ... In our country, where we have a one-party system, we do not claim our system is the ultimate protection of human rights ... What we have rejected is the claim that a multi-party system is the ultimate protection"; see ibidem, p. 19.

system did not call into question the relevance of the liberal conception of human rights as such. Instead, they challenged the emphasis given to civil and political rights in Western constitutionalism, proposing that these could be subject to restrictions as long as they were required in the public interest. Beyond the above allegation of the compatibility of the one-party system with the enjoyment of human rights, it was admitted that certain rights are necessarily limited in a single-party state. However, this admission was generally confined to the freedoms of association and expression.

However, as experienced in sub-Saharan Africa, unipartism cannot be reconciled with the enjoyment of civil and political rights due to both its institutional organisation, distribution (or rather concentration) of power, and also its theoretical justifications and premises.

4.4.1 Fundamental Rights Necessarily Infringed by the Single-Party System

The idea that the problems of African states should be addressed by strong government necessarily involved the exclusion of any opposition and the restriction of the freedoms of association, assembly and expression. However, other freedoms were denied under the single-party system and it was precisely these rights which the advocates of unipartism argued would receive better protection under unipartism than multi-partism. These included the right to vote and be elected and the right to participate in the government of one's own country. Furthermore, the restriction of all of these freedoms was at the origin of the infringement of another right, the right not be discriminated against on political grounds.

The freedom of association and the right to freely choose which organisation to join were suppressed.²⁶⁸ These rights correspond with a specific duty on the State to ensure to everyone the possibility to choose and even to establish new organisations.

²⁶⁸ In fact, neither the UDHR (see Article 19) nor the ICCPR (see Article 22) mention the right to form and become a member of political parties as a component of the freedom of association, while the right to form and become a member of trade unions is expressly included in the ICCPR. Even during the discussion on the drafting of the Covenant, the issue of the compatibility of the single-party system with the freedom of association was hardly raised, nor was any conclusive position taken on the issue; see K.J. Partsch, "Freedom of Conscience and Political Freedoms", in Henkin, *The International*, cit., p. 235. Partsch also states that although a proposal for the prohibition of certain political organisations was rejected (see Bracco (Uruguay), UN Doc. E/CN.4/SR.325 AT 15 (1952)), the proposal of a member of the Commission on Human Rights for including an explicit prohibition on the outlawing of political parties was also turned down; *ibidem*, p. 235. At regional level, the African Charter, consistent with the prevailing trend in the sub-Saharan African constitutional orders, has a very restricted formulation of the freedom of association. Article 10 states: "*Every individual shall have the right to free association provided that he abide by the law*". It does not mention either political rights or trade unions. Moreover, the African Charter leaves the legislature completely free to establish limitations on the freedom of association, while the other regional instruments require that possible restrictions are "prescribed by law and necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of

Another component of the freedom of association which was also impinged upon by a single-party system was the right not to be forced to join any associations.²⁶⁹ In fact, several African states obliged their citizens to become automatic members of the single party.²⁷⁰ Moreover, non-political organisations were indirectly compelled to affiliate themselves to the party, for example in the case of Zambia, by requiring that they were “not prejudicial to the national interest”.²⁷¹

Another freedom which proved to be irreconcilable with the single-party system was the freedom of assembly. The prohibition of the formation of political organisations other than the single party also entailed the impossibility to convene or participate in the meetings of these organisations.

The question of the limitation of the freedom of expression, which is already limited by the restriction of the freedoms of association and assembly, was more complex.²⁷² The problematic aspect regarding this freedom lies in the contention that it could be fully enjoyed within the party despite the fact it could not be used to oppose to the party and its policies. Even in some of the scholarly literature, it was suggested that the one-party system could be considered compatible with the enjoyment of the freedom of expression “as long as the state does not interfere with expression which suggests changing such a system”.²⁷³ However, in the African single-party systems, the state corresponded with the party and within it there were no institutional mechanisms provided within it to guarantee the freedom of expression.

However, the above condition advanced by Partsch is lacking. Even Kaunda, who declared that the party could welcome anyone as members (even those who did not share the objectives of the party), imposed the acceptance of “the constitutional provision that there be only one political party in Zambia”²⁷⁴ as a precondition for party membership.

others” (Article 11(2) of the European Convention). The American Convention contains a similar provision, see Article 16 (2). Article 22(2) of the ICCPR also states that “no restrictions may imposed unless prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the right and freedoms of others”.

²⁶⁹ See Article 20(2) of the UDHR.

²⁷⁰ This analysis shall be restricted to exploring how the structural features of single-party systems impinge on fundamental rights and freedoms, without considering the use of coercion. The freedom of association was also denied by making recourse to coercion. In Zambia, for example citizens were prohibited from entering markets or using public buses if they did not have the membership card of the UNIP; see Mwanakatwe, *End, cit.*, pp. 96-97.

²⁷¹ In all single party states, trade unions, women’s and student associations, co-operative movements, professional societies were co-opted by the party. The instrument used was that of “affiliated membership”.

²⁷² Freedom of assembly can be considered as an “institutional form of freedom of expression”; see M. Novak, *U.N. Covenant on Civil and Political Rights, ICCPR Commentary*, N.P. Engel Publisher, Kehl, Strasbourg, Arlington, 1992.

²⁷³ Partsch, *Freedom*, cit., p. 225.

²⁷⁴ K. Kaunda, *Comments by His Excellency President Kaunda of Zambia on the Conclusions*, in ICJ, *Human Rights*, cit., p. 125.

In practice, freedom of expression in one-party systems in sub-Saharan Africa varied throughout the region. In Zambia, it has been observed that "a certain degree of pluralism was tolerated"²⁷⁵ both outside and inside the party. An example of this is the parliamentary opposition to the original 1974 Bill amending the constitutional provision concerning the right to damages in the case of invalid preventive detention. In the parliament, the preservation of immunity for parliamentarians regarding statements made in the Assembly allowed some MPs to play a role similar to that of a "minority opposition".²⁷⁶ Outside the party, trade unions and student groups were among the most vibrant critics of the government. Their activity was not prohibited and, in certain cases, their freedom of expression was also safeguarded by the judiciary. Nonetheless, their critical presence cannot be defined as free, but rather as tolerated. Indeed, the government took various measures aimed at hampering their activities, among which included a ban of strikes. It is important to underline that the term used is "tolerate", precisely because the enjoyment of the freedom of expression rested to a great extent on the discretion of the leadership.²⁷⁷

Therefore, as shown above, the single-party system was not capable of guaranteeing the right to political participation, defined by the ICCPR as the right "(a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of electors".²⁷⁸

The ideal of political participation set forth by one-party states was the notion of mass participation through the party²⁷⁹ and not through elections and control of the government on the part of the people as in the liberal-democratic tradition.²⁸⁰

²⁷⁵ M. Bratton and N. Van de Walle, *Democratic Experiments in Africa*, Cambridge University Press, Cambridge, 1997, p. 81.

²⁷⁶ See Mwanakatwe, *End*, cit., pp. 103-104.

²⁷⁷ Freedom of expression not only includes the "freedom to hold opinions without interference" (Article 19 of the UDHR and Article 19(1) of the ICCPR), but also the freedom to seek and receive information and ideas; see Article 19 of the UDHR and Article 19(2) of the ICCPR. This component is also limited under a single-party system because it confines the sources of information of political nature to the single-party and because the means of information are either owned or controlled by the party.

²⁷⁸ Article 25. See also Article 21 of the Universal Declaration of Human Rights.

²⁷⁹ As seen above, in the preamble to the Zambian Constitution, the Zambian single-party state was defined as a "one-party participatory democracy". The idea of popular participation in which electoral participation does not play the major role is confirmed, at regional level, by the African Charter. This does not even mention the right to vote, confining itself to provide that "*every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law*", see Article 13. The understanding of political participation and of the party advanced by one-party states resembles that of the Soviet Union; see H.J. Steiner, "Political Participation as a Human Right", in *1 Human Rights Yearbook*, 1988, pp. 77 seq. In concrete terms, according to African one-party ideology, there should have been several organs of political participation: the parliament and local councils, party committees and conferences at various levels starting from the village level which would have performed the role of channels of

The conception of political participation advanced by African single-party states was considered adequate on the grounds that the party identified with the whole nation.²⁸¹ The first factor undermining the viability of this model is specifically that this was an assumption which did not correspond with the reality. Not only is this demonstrated by the low number of paying members, as was the case in Zambia,²⁸² but also in the fact that a prerequisite for joining the party was the supporting for its objectives. Even if it is assumed the party was open to everyone, it is still questionable whether a single-party state can assure political participation, which as a minimum requirement "should never require less of a government than provision for meaningful exercise of choice by citizens in some form of electoral process permitting active debate on a broad if not unlimited range of issues".²⁸³ The various experiences in sub-Saharan Africa displayed the weakness of single-party system to guarantee this minimum.

Freedom of expression is an essential aspect of "active debate". However, as seen above, the single-party system did not develop any institutional mechanisms for the guarantee of dissent, which was merely dependent on the degree of tolerance of the ruling élite or on the courage of the party's individual members. With regard to the extent of popular involvement "in the conduct of public affairs" stated in the ICCPR, this should have been achieved through the local representation of the party. In reality, local branches of the various African single parties were either barely organised and rarely involved in the policy-making process.²⁸⁴

Mass participation was not even fully achieved in the selection of party leadership and the parliamentary and presidential candidates. Even in the most competitive countries such as Zambia and Tanzania, the nomination of parliamentary candidates by the local branches of the party was counterbalanced by the vetting power vested in the main body of the national party.

communications of ideas and reactions between the national and the local level; see P. Msekwa, "The Doctrine of the One-Party State in Relation to Human Rights and the Rule of Law", in ICJ, Human Rights, cit., p. 27.

²⁸⁰ Of the two components of political participation set forth by the ICCPR (see Article 25), African states have emphasised the "take part" clause, while Western liberal-democracies have privileged the "elections" clause.

²⁸¹ In Zambia, it was defined as "the sole custodian of the people's interests"; Resolution of the Nation Council of UNIP, 1975.

²⁸² In Zambia only 7 percent of the population were paying members of UNIP in 1977; see Mwantakwe, End, cit., p. 96.

²⁸³ Steiner, Political, cit., p. 134.

²⁸⁴ Local branches of the party in Zambia "were merely passive recipients of what a few unrepresentative local officials wanted them to know or to do in the name of the party"; Mwantkwe, End, cit., p. 96. Even Tanzania, which among all of the single-party states in sub-Saharan Africa made more efforts in the direction of a participatory democracy, did not represent an exception; see H. Glickman, "Frontiers of Liberal and Non-Liberal Democracy in Tropical Africa", in 23 *Journal of Asian and African Studies*, 1988, p. 248.

Moreover, members of the party were completely excluded from the nomination of the candidates for presidential elections, which rested with the highest body of the party.²⁸⁵

As for the right to vote, the mere fact that periodic elections were held, as occurred in Zambia, does not mean that this right was enjoyed in its substantive meaning. The core of the right consists in the expression of a "free will" through the material act of voting. This presupposes the possibility to choose among a plurality of candidates presenting different programmes. In single-party states, these conditions were missing: there was only candidate in presidential elections, while in parliamentary elections - despite the presence of more candidates - one could not choose among alternative programmes given the fact the candidates needed the support of the leading élite of the party as part of the selection process.²⁸⁶ In this regard, the right to be elected was also not fully guaranteed because party membership was a prerequisite for candidature at both presidential and parliamentary election.

Therefore, the historical experience in sub-Saharan Africa has shown that as a political system, unipartism was not supported by an institutional framework that had the ability to guarantee the citizens' right to political participation, either in the form of electoral democracy, championed by the liberal constitutional tradition, or in the form of mass participatory democracy. Similar to freedom of expression, political participation ultimately depended upon the democratic commitment of each state, or more precisely of each national leader.²⁸⁷

4.4.2 The Absence of Restraints on the Political Power

Independently of the impact on individual rights, the single-party system proved to be intrinsically incompatible with the protection of human rights because of the absence of constitutional constraints of possible abuses on the part of the political power.

The single-party state lacked a system of checks and balances which can be only guaranteed through the separation of powers. Instead all of the power was concentrated within

²⁸⁵ In Zambia, candidates for parliamentary elections were nominated at local level by party officials. All of the candidates were then vetted by the Central Committee of the party, which had the power to reject candidates if judged "inimical to the interest of the state". This system of veto allowed Kaunda to prevent any political opponent, particularly former UPP members who joined the UNIP, to be elected in parliament. In 1982, local-level primaries were excluded. Candidates were nominated by an electoral commission appointed by the Central Committee; see R. Howard, *Human Rights*, cit., p. 142.

²⁸⁶ When Kaunda was challenged in 1988 by two other candidates, he amended the party's selection regulation providing that candidatures had to be firstly approved by the UNIP's National Council. The other conditions for candidature were a minimum five-year membership of the party and the support of nomination by at least twenty delegates from each province of the country.

²⁸⁷ Above all Tanzania seems to have made attempts for intra-party democracy and a greater popular participation. In 1982, for example, the party decided to introduce a secret ballot in the election of the Chairman and the Vice-President of the party; see Howard, *Human Rights*, cit., p. 143.

the Party.²⁸⁸ Both the executive and legislature corresponded with the Party. As seen in the preceding sections, a fusion between the party and the state was achieved at the level of the executive by the constitutional institutionalisation of the organs of the Party. Moreover, the sovereignty of the legislature was eroded by the fact that MPs were considered as agents of the Party. In fact, the status of the members of Parliament rested on membership in the party: seats in parliament were forfeited in the case of loss of Party membership, which could be caused by expulsion in the case of a critical position with respect to the Party's line. In this framework, the judiciary cannot be considered as a counterbalancing power as its independence was undermined by the presidential power of appointment and removal of judges. Furthermore, the creation of the office of the ombudsman, cannot be deemed as a sufficient guarantee of citizens' rights despite the undeniable positive aspects of this, such as the informality of procedures and the low costs of its proceedings. The presidential appointment of the office of ombudsman weakened its independence and the presidential prerogative to restrict its investigative powers only served to lower its actual effectiveness. The fact that its recommendations were left completely to the discretion of the President might deprive its activity of any effects in the final analysis.²⁸⁹

The lack of constraints on political power was also derived from the conception of the constitution as subordinate to politics, which was common to sub-Saharan African single-party states.²⁹⁰ The constitution was conceived as an instrument to be used by the political power and not as its foundation and constraint; this also implies that there were no core principles which were deemed unalterable. By refusing to take a position in relation to the introduction of the single-party system in the Nkumbula case, the Zambian High Court clearly expressed its understanding that the constitution was being completely subject to the power of intervention of the political power even as human rights are concerned. This is an important deviation from the interpretation of liberal constitutionalism where a limit on the constituent power is represented by fundamental rights and freedoms. Therefore, a part of the constitution

²⁸⁸ It has to be underlined that the establishment of single-party systems was usually accompanied by the enhancing of presidential power, giving birth to a form of government which some scholars have termed "presidentialist" and defined as a degeneration of the presidential system, see above ft. 144.

²⁸⁹ The weakness of this institution is made clear through the way it was designed. At the ICJ Seminar, one member of the Tanzanian PCE explained that this commission was set up because it "*would provide better safeguards for the individual than a bill of rights*" but he also added that it "*should not limit the actions of the government or party in way which would interfere with the task of national building*"; see J.B. Mwenda, "Summary of Procedures for Investigating Complaints in the Permanent Commission of Enquiry", in ICJ, Human Rights, cit., p. 76.

²⁹⁰ Conac wrote that the constitution in sub-Saharan Africa "*n'est pas une barrière juridique amis l'une des techniques que le pouvoir met au service de ses objectifs*"; Conac, L'évolution, in Conac, Les institutions, cit., p.23. Evidence of this perception is clearly seen in Zambia by the inclusion of the constitution of the party in the state constitution and by the interpretative value given to the former in respect to the latter.

cannot be subject to revision by the political power because it is perceived as the ultimate foundation of the constitutional order. In this way, Sub-Saharan African constitutional development was conversely characterised by the idea that the constitution as a whole is an instrument of the political power and not a restraint on it.²⁹¹

²⁹¹ See M. Dogliani, "Potere costituente e revisione costituzionale nella lotta per la costituzione", in G. Zagrebelsky, P.P. Portinaro, J. Luther (a cura di), *Il futuro della costituzione*, Einaudi, Torino, 1996, p. 253; G. Zagrebelsky, *Diritto costituzionale. Il sistema delle fonti*, UTET, Torino, 1988, p. 100 seq.

CHAPTER 5: Military Regimes and Systems Inspired by Socialist Constitutional Models: the Case of Benin

5.1 Military Regimes

One of the most striking features of the post-colonial history of sub-Saharan Africa is the large number of military coups d'état,²⁹² which affected many countries including Benin, Burundi, Burkina Faso (former Upper Volta), Central African Republic, Chad, Comoros, Congo, Equatorial Guinea, Ethiopia, Ghana, Guinea, Guinea-Bissau, Lesotho, Liberia, Madagascar, Mali, Mauritania, Niger, Nigeria, Rwanda, Seychelles, Sierra Leone, Somalia, Sudan, Togo, Uganda, Zaire. The frequency of coups d'état was linked to the unwillingness or incapability of the civilian governments to address the critical economic and financial situation inherited at the time of independence, as well as the regionalist and ethnic tensions, which the civilian leaderships themselves helped create. The inefficiency and corruption of civilian governments together with the refusal of their leaders to ensure the transition to democracy undermined their legitimacy. In this context, the army was the only well-organised and disciplined institution, which could present itself as the only force in a position to administer the state, guarantee national unity and put an end to the abuses committed by the civilian regimes. The violation of human rights perpetuated by civilian governments was one of the abuses cited by the army as a justification for their intervention.

Military take-overs followed certain common patterns. They were usually organised upon the initiative of the head of the armed forces or of a collegial body, from which a leading figure soon emerged. Another usual feature was the way in which the army legitimised itself as a ruling force by linking itself with a political party, which could be either an already existing single party or a party which was formed for that purpose, as in the case of Benin. Therefore, what emerged was a type of fusion between the highest organ of the military, state institutions of a civilian nature and the Party. The power was centralised in the hands of one man, who was simultaneously the head of the army, the state and the party. In essence, military regimes were a variation of the authoritarian form of government which, in various forms, dominated the post-independence African states.

There are two principle models of military interventions which have been identified in the literature. In the first, the intervention of the army had a provisional character and aimed

²⁹² See S. Decalo, *Coups and Army Rule in Africa: Studies in Military Style*, New Haven, Yale University Press, 1976; S. Decalo, "Military Coups and Military Regimes in Africa", in 11 *Journal of Modern African Studies*, 1973, pp. 105-127; W.F. Gutteridge, *Military Regimes in Africa*, Methven & Co., London, 1975.

to re-establish order in a situation of conflict. After having fulfilled this mission, the military left the power to a new civilian government. The second model was articulated in different phases, through an initial period, which has been defined as “*aconstitutional*”,²⁹³ in which the army acted without a formal constitutional framework and with a simplified institutional structure; and a second phase, in which the regime tended to be more authoritarian and ideologically-inspired; and, finally, a third phase which involved the opening of the regime’s organs to civilians as well as the constitutionalisation of the system. After the initial phase when constitutions were repealed or suspended, new constitutions were adopted and generally submitted to referendum. In the second model, the constitution was used as a source of a legitimatisation for those in power with the further function of reducing their dependence on the army in order to ensure some stability within the new regime. The provisions relating to human rights protection always included civil and political rights as an essential component of the constitutional package which was necessary for the formal “decency” of the regime before the international community. In practice, civil and political liberties, for whose restoration the military claimed it had intervened, were suppressed to different extent in the different regimes.²⁹⁴ In case of violent take-overs, the rights which were immediately violated were the rights to life, personal liberty and security, which also continued to be suppressed after the stabilisation of the regime as a reaction to any manifestation of dissent or even suspicion of dissent. Freedom of expression was also restricted in the establishment of the military rule. One of the first actions of the army consisted of taking control of the media. All political rights were denied because no alternative political force or opinion was permitted apart from that of the regime. The presence of a single party and a state ideology, as in the case of Benin, were further elements which reinforced the restriction of political freedom.

²⁹³ M.-L. Martin, “Note sur le changement politique et constitutionnel en République populaire du Bénin depuis l’indépendance”, in *Année africaine*, 1982, p. 107.

²⁹⁴ R.D. McKinlay and A.S. Cohan, “Performance and Instability in Military and Non-Military Regime System”, in *70 American Political Science Review*, p. 853; C. Henderson, “Military Regimes and Rights in Developing Countries: A Comparative Perspective”, in *4 Human Rights Quarterly*, 1982, pp. 110-123.

5.2 Systems Inspired by Socialist Constitutional Models

The abandonment of the liberal-democratic constitutional model was marked by the emergence of socialist systems in certain countries, which was also a reflection of international politics and more particularly, of the fall under the Soviet and in certain instances, of China's influence in certain African countries. Among these states, which the Marxist scholarship has defined as "*états à option socialiste*",²⁹⁵ there were some which formally proclaimed their adherence to Marxist-Leninist doctrine. This proclamation can be found in the body of the constitutions themselves, as in the case of the 1977 Constitution of Benin, as well as in that of the constitutions of the Popular Republic of Congo (1973), Madagascar (1975), Mozambique (1975), Angola (1976) and Somalia (1979). Among the reasons underlying the success of Marxist-Leninism in sub-Saharan Africa is the fact that it provided African leaderships with a tool to explain the reason for the socio-economic failures of previous regimes and to predict possible future development. Moreover, it provided an ideological justification for the concentration of power and the restriction of individual liberties, which was not unlike the situation in other non-Marxist single party African regimes. In Marxist and non-Marxist regimes, the relationship between individual citizens and the state was regulated by the ideal of the priority of the collective interest over individual rights. The difference consisted only in the concepts used to explain the collective interests, which included development, national unity and, in the regimes which adhered to Marxist-Leninism, the defence of the socialist revolution.

The African socialist states specifically referred to the constitutional models of the Soviet and also at times, the Chinese model. In reality, these states were characterised by the combination of elements belonging to many different traditions. Terms such as hybridisation and syncretism²⁹⁶ have been used to describe African constitutions, including those proclaiming to uphold the Marxist-Leninist ideology. For example, the states of Benin and Congo could not be defined as socialist if one considers that, despite the formal proclamations,²⁹⁷ they were ruled or controlled by the army, which, moreover, was allied to

²⁹⁵ V. Tchirkine, "L'état à option socialiste dans les Pays africains: apparition, nature sociale et perspectives d'avenir", in *Mélanges offerts à P.F. Gonidec. L'Etat Moderne: Horizon 2000*, LGDJ, Paris, 1985, p. 257 seq. According to this author this definition could be applied to the following sub-Saharan African states: Angola, Benin, Guinea Bissau, Congo, Ethiopia, Madagascar, Mozambique, Cape Verde, Seychelles, S. Tome and Principe, Tanzania.

²⁹⁶ P.F. Gonidec, "Esquisse d'une typologie des régimes politiques africains", in 25 *Pouvoirs*, 1983 p. 66-77; P.L. Agoudjo-Okawa, "L'état africain, un état hyride, neo-colonial", in *Mélanges P.F. Gonidec*, cit., p. 30 seq.; D.G. Lavroff, "Les tendances du nouveau constitutionnalisme africain", in *Conac, Dynamique*, cit., 419-421.

²⁹⁷ The 1977 Constitution of Benin referred to "*l'Union nationale de toutes les classes et couches sociales patriotiques et révolutionnaires du pays dont la base est l'alliance des ouvriers et des paysans*".

the country's bureaucracy and traditional leaders.²⁹⁸ The formal recognition of individual property in broader terms than in the Soviet Constitution and the presence, as in the case of Congo, of a large private sector are further manifestations of the hybrid nature of the African socialist state. However, the basic tenets of socialist systems can be found in the African constitutions inspired by Marxist-Leninism. Firstly, the principle of the separation of powers was rejected in the name of a strict interpretation of the principle of popular sovereignty. Thus, African constitutions, which were modelled on the Soviet constitutional model, provided for a distinction of functions within a power that was conceived as unitary. Secondly, on the basis of the above interpretation of the principle of popular sovereignty, all of the state organs were held responsible before the people or the organ representing it. This principle also applied to the judiciary. Both professional and lay judges were elected and their mandate could be revoked on the basis of political responsibility, which was linked to the fact that in applying the constitution and other sources of law, they were obliged to pursue the goals established by the Marxist-Leninist doctrine as indicated by the party. In this regard, another typical feature of the socialist systems introduced in sub-Saharan Africa was the constitutionalisation of the party.²⁹⁹ Other common features of the sub-Saharan Africa socialist constitutional systems included the principle of democratic centralism (Article 7 of the 1977 Constitution of Benin; Article 32 of the 1982 Constitution of Guinea); the provision of the parliamentary mandate as an imperative mandate of the party (Article 4 of the Constitution of Benin); the replacement of the legislature by the executive during the periods when the former was not in session (Article 77 of the 1975 Constitution of Madagascar); the immunity of the President (Article 63 of the Constitution of Benin; Article 24 of the 1982 Constitution of Guinea); and the rejection of economic liberalism and the provision of centralised economic planning.

As far as human rights were concerned, the constitutions of socialist states acknowledged the rights and freedoms covered by the international covenants on human rights and, therefore, as far as the typology of rights was concerned, socialist African constitutions differed from the independence constitutions with respect to the previously lacking or very limited recognition of social and economic rights. However, the underlying conception of human rights was profoundly different from the liberal one and this conditioned their actual content and actual implementation. The socialist conception of human rights was

²⁹⁸ Agoudjo, *L'Etat africain*, cit. pp. 31-32.

²⁹⁹ See Article 32 of the 1982 Constitution of Guinea; Article 34 and 78 of the 1978 Constitution of Congo.

based on two fundamental principles, namely the "unity and indissolubility of rights and obligations of citizens" and the "unity and combination of personal and public interests".³⁰⁰ The first of these two principles indicate that rights were also conceived as duties. The socialist concept of obligations as correlative to rights differed from the liberal conception, where obligations (correlative to rights) are owed by society to the right-holders. In the socialist conception, these obligations were conceived as obligations of the right-holders themselves towards society. This perspective was linked to the "characteristic justificatory principle of socialist organisation [that is] the equal satisfaction of need at the highest level of fulfilment".³⁰¹ In human rights terms, this principle implied that "any particular person is both a receiver of what he needs and a contributor to the social mechanisms designed to see that he and others receive what they need".³⁰² A symbolic example of this was the right to work, which was defined as a right as well as a duty in the 1977 Constitution of Benin.

The correlative principle of the unity and combination of personal and public interests implied that personal freedom should be exerted in such a way to satisfy the collective interest. Liberties were not understood as individuals' entitlements but rather as social functions. Under this view, personal freedom was defined as "personal arbitrariness" if it "disregards the interests of the society as a whole and the interests of the collectivity".³⁰³ This conception of liberty corresponded with the requirement for individual rights to be exerted in pursuit of the objective of the consolidation of socialism and its achievements. It was also consistent with the idea that a situation of real freedom, in which human rights could be actually enjoyed, needs to liberate individuals from exploitation and therefore, lead to the realisation of a socialist society. In line with this perspective, civil and political rights continued to be recognised in sub-Saharan African constitutions, however their actual enjoyment was severely conditioned by the express subordination of their exercise to the ultimate goals of the socialist revolution (see Article 140 of the Constitution of Benin; Articles 16 and 28 of the 1975 Constitution of Madagascar; Article 29 of the Constitutions of Congo of 1973).³⁰⁴ In practice liberty was denied as it was permitted if it did not challenge the established order.

³⁰⁰ V. Kartashkin, "The Socialist Countries and Human Rights", in Vasak, *The International Dimension*, cit., pp. 632 and 634.

³⁰¹ T. Campbell, *The Left and Rights: A Conceptual Analysis of the Idea of Socialist Rights*, Routledge and Kegan, London, 1983, p. 142.

³⁰² *Ibidem*, p. 144.

³⁰³ *Ibidem*, p. 633.

³⁰⁴ Ajavon, *La protection*, cit., 1992, p. 86.

5.3 Benin: A History of Political and Constitutional Instability

Until 1972, Benin was affected by a huge political and constitutional instability which was marked by several coups d'état and the succession of six constitutions. Apart from the 1977 Constitution, the constitutions were short-lived and the one of 1968 was never even implemented. The political instability, which was reflected in the number of constitutions, was due to a range of factors. Among these, regionalism played a significant role. As seen above, this was due to the existence of a strong sense of regional belonging, which the French had encouraged and national leaders had exploited. The divisions caused by the regionalist politics of these leaders, accompanied by clientelist politics and corruption which accounted for the inefficiency of civilian governments, served to reinforce social discontent, especially among students and workers, and allowed the army to emerge as the only force capable of solving the economic and financial problems of the country.³⁰⁵ Another element to take into consideration was the political activism of Benin's educated élite and trade unions, which manifested itself in a strong opposition to governmental policies. This contributed to the frequency of political crises, which were usually 'solved' by the army. The activism of trade unions was closely connected to the composition of the majority of its membership, which was made of public employees and unemployed people with a strong educational background. They were more frustrated than others by the economic situation which had been left in a very poor condition by France and which the national civilian leadership were unable to deal with.

5.3.1 The Coup d'Etat and the Constitution of 1964

The Constitution of 1964 was the third constitution adopted in the history of the country and the first one which was adopted on the initiative of the military after a coup d'état.

The first elections following the unification of the PRD and the RDD held in December 1960 witnessed the victory of the new party over the UDD. The PDU obtained all of the seats in the Assembly and, thus, the new government was only formed of individuals from the new party, while Maga and Apity were elected President and Vice-President, respectively. The rivalry between the two leaders, the fears of a clash between the North and the South, the social tensions determined by the unpaid wages and the establishment of a unified trade union, which resulted in strikes and rallies, were the reasons invoked by Colonel Soglo for the coup d'état of 1963. On 27th October, a provisional government was formed and a constitutional commission was appointed with the task of drafting a new constitution. In

³⁰⁵ Martin, Note, cit., pp. 92-93.

the meantime, a single party called the *Parti Démocratique Dahoméen* (PDD) was established. The new constitution was adopted by referendum in January 1964. The referendum had a participation rate of 92.7 per cent and the Constitution was approved by 99.81 per cent of votes. The Constitution provided for a presidential form of government with a President and a Vice-President of the Republic which would be elected every five years by direct universal suffrage. As in the 1960 Constitution, the rationale behind this two-headed executive was the need to ensure that both the Northern and the Southern regions were represented.

The President presided over the Council of Ministers and had the power to call for a referendum. Furthermore, he had the same special powers as the President of the French Republic under Article 16 of the 1958 French Constitution. In order to be effective, these powers had to be exerted within the Council of Ministers or with the agreement of the bureau of the National Assembly. The Vice-President was the head of government and, as such, appointed ministers, determined and led the national policy, held regulatory powers and had legislative initiative.

The National Assembly was elected every five years by direct universal suffrage on the basis of a proportional electoral system. The powers conferred on the Assembly were substantially the same as those provided for in the 1960 Constitution, with the only additional power to request the executive for information and explanations for its actions. The organisation of the judiciary remained similar to that laid down in the previous constitution.

The inclusion of a title devoted entirely to human rights in the 1964 constitution set it apart from the previous ones of 1959 and 1960. Title II, entitled "*Des droits et des devoirs du citoyen*", guaranteed the freedom of speech, press, assembly, association and demonstration under the conditions provided by the law. The inviolability of domicile and the secrecy of correspondence were also provided. Moreover, the Constitution prohibited arbitrary detention and established the principle of the presumption of innocence. Equality for all before the law without any distinction based on origin, race, sex, religion or political membership was also ensured. Economic and social rights were also recognised, including the right to work, the freedom of organisation of workers and the right to strike. With regard to the right to work, the Constitution specified that the state "*s'efforce*" to create the conditions which would make this right effective. Citizens' duties were confined to the defence of the nation and the territorial integrity of the country.

Following the adoption of the new constitution, the new government was formed and for the first time in the nation's history there were no representatives from the North. Due to

renewed tension between Apity and Ahomadegbé, in November 1965, the army decided to intervene again by dissolving the PDD and forced the two leaders to resign. Thus, according to the Constitution, the President of the Assembly, Tahirou Congakou, became President and head of the provisional government. The army gave him the task of drafting a new constitution. In the meantime, tripartism returned to the political scene. Three parties led by the independence leaders were formed. These were *Convention Nationale Dahoméenne* (led by Apity), the *Union Nationale Dahoméenne* (led by Maga) and the *Alliance Démocratique Dahoméenne* (led by Ahomadegbé).

Apity and Maga boycotted the Assembly, which had to vote on the draft constitution, hoping for a military intervention in elections under the old constitution. This hope was subsequently satisfied. On 22nd December 1965, Soglo carried out a second coup d'état, with the support of public opinion, and formed a provisional government, which was also composed of civilians, with the programme to improve the economic situation of the country. In the absence of a constitution, the regime was organised around a cabinet presided over by Soglo and composed of three officers and ten civilians. Furthermore, a *Comité de rénovation nationale* was set up with a mixed composition and was vested with legislative powers in socio-economic matters. Finally, the local administration remained under the control of civilians.

5.3.2 The Constitution of 1968

The measures adopted by the new government to improve the economic and financial situation of the country were very unpopular. This led to the holding of strikes and a general strike was also threatened. The resistance to the economic policy of the government together with the tensions of regional³⁰⁶ as well as of political nature within the army between the new, politicised generation of officials and the colonial generation provided the background to a new coup d'état. This took place on 17th December 1967 on initiative of commander Maurice Kouandété. Similar to Soglo two years previously, Kouandété committed himself to re-establishing a civilian government and to the drafting of a new constitution. In the meantime, he became the head of government, while the Lieutenant Colonel Alphonse Alley became the President of the Republic. Lieutenant Colonel Mathieu Kérékou was firstly made the Vice-President and then he became President of the Military Revolutionary Committee, which was created after the coup d'état.

³⁰⁶ Officers were mostly southern and Fon, while rank and file military were predominantly from the North.

The new constitution which was drafted by a constitutional committee was submitted to a referendum on 31st March 1968 and entered into force on 11th April. With the aim of strengthening the executive, this constitution established a presidential form of government, which, for the first time since 1960, featured a unitary executive represented by a President, a head of state and government elected for five years by universal direct suffrage. The president continued to have special powers similar to the previous constitutions.

The most noteworthy feature of this constitution was the institutionalisation of the single party ("*Parti nationale unique*"), as well as the subjection of the country to a form of military "*tutorat*".³⁰⁷ The single party participated in the formulation of the general policy of the nation (Article 104), in the "*conscientisation des masses*" and inspired the action of the government (Article 106). Moreover, the army was given the role of "*garant du régime*" and participated in its "*édification*" (Article 39-40).

The preamble of the Constitution proclaimed "*l'attachement aux principes de la démocratie et des droits de l'homme, tels qu'ils ont été définis par la Déclaration des droits de l'homme et du citoyen de 1789, par la Déclaration universelle de 1948 et la Charte de Nations Unies et tels qu'ils sont garantis par la présente constitution*". Moreover, Title II entitled "*Des droits et des devoirs du citoyen*" guaranteed a more extensive list of civil and political rights than the previous constitution. In addition, second generation rights and duties received increased attention. After proclaiming that "*[l]a personne humaine est sacrée. L'Etat a l'obligation de la respecter et de la protéger. Il en garantit le plein développement*", the first article of Title II (Article 6), provided that the state was obliged to guarantee equal access to education, vocational training and culture. Furthermore, similar to the Constitution of 1964, the right to work, to organise and to strike were recognised. As far as duties were concerned, the Constitution did not confine itself to the duty to defend the nation and the territorial integrity of the Republic, but also mentioned the duty "*de travailler pour le bien commun, de remplir honnêtement toutes leurs obligations civiques et professionnelles, de s'acquitter scrupuleusement de leurs contributions fiscales et de se conformer en toutes choses à la constitution et aux lois de la République*".

Elections were held on 5th May 1968 and were marked by violence and irregularities. Only 27 percent of the population participated and the Revolutionary Committee did not announce the results. In July, the army appointed Emile Derlin Zinsou as President of the Republic and in the same month, Zinsou was confirmed by popular referendum.

³⁰⁷ M.-L. Martin, "Bénin", in F. Reyntjens et al., *Constitutiones Africae*, Bruylant, Bruxelles, 1988, p. 23.

5.3.3 The 1970 Charter of the Presidential Council

Following dissent within the army with respect to its role in governing the country, a new coup d'état took place in December 1969 led by commander Kouandété. A *Directoire militaire*, composed of three persons, including Kouandété, was set up under the presidency of colonel Paul-Emile de Souza. According to the *Charte du Directoire* adopted by ordinance on 26th December 1969, the *Directoire* was accountable to the Supreme Council of the armed forces and was vested with both executive and legislative powers. A *Court suprême* and a *Conseil économique and social* with advisory powers were created on the basis of the *Charte*.

On 7th May 1970 the *Directoire* introduced a new constitution with the collaboration of the leaders of the independence period. This was the fifth since 1959 and was called *Charte du conseil présidentiel* and was marked by the return to power of civilians.

Both the executive and legislative powers and the power to determine the national policy were concentrated in the *Conseil Présidentiel* with a tripartite composition and presided in turn by the each of the leaders of the three parties for a period of two years according to a pre-determined order. It was stipulated that decisions should be taken unanimously. However, decisions should be adopted by the majority in the case of opposition raised (at least three times) by one of the members of the Council. The President of the Council was head of the state and government and had the power to appoint the ministers. Furthermore, while providing that he was the supreme head of the armed forces, the Constitution expressly prohibited that recourse could be made to the army to retain his own power. A *Court suprême* and a *Conseil supérieur de la Magistrature* were also established. An *Assemblée consultative* composed of a political, an economic and a social section was created in 1972.

As far as fundamental rights and freedoms were concerned, this Constitution did not introduce any new element with respect to previous ones. The preamble confirmed Benin's attachment to the principles of democracy and human rights as defined by the 1789 French Declaration, the Universal Declaration and the UN Charter. Moreover, Title II on "*Des droits et des devoirs du citoyen*" repeated the core list of rights and freedoms guaranteed under the preceding constitution. Unlike the 1968 Constitution, however, the right to property was not mentioned. With regard to duties, the 1970 Charter only referred to the duty of the defence of the nation.

5.3.4 The 1977 Basic Law

5.3.4.1 The Political and Constitution-Making Process Leading to the Adoption of the 1977 Basic Law

The 1970 Constitution, which was presented as a provisional document, was in fact short-lived. After an attempted coup d'état by Commander Koundété, another coup (this time successful) was organised by Captain Mathieu Kérékou on 26th October 1972, clearly showing that the army was a key actor in political the life of Benin.

Following this coup, the Constitution was suspended and Kérékou became President of the Republic and head of the *Gouvernement militaire révolutionnaire* (GMR), in which all the power was concentrated and was composed of twelve officials. Subsequently, an ordinance of 11th November 1972 (modified on 17th April 1973) established a *Comité militaire pour la révolution*, comprising fifteen members from all military grades. This committee was vested with advisory powers and the control of the administration. Finally, the institutional framework included a *Comité consultatif national*, which could be considered as a legacy of the *Assemblée consultative* of the *Conseil Présidentiel* of the previous regime and which was composed of approximately one hundred members representing the different economic, social, cultural and religious interests which existed in the country.

This military regime justified its existence on the basis of its commitment to the fight against corruption and to ensuring national unity, however, unlike the previous ones, it endowed itself with an ideological basis. In 1973, its ideological reference became the doctrine of "authenticité" formulated by Mobutu in Zaire and a year later, it was Marxist-Leninism. The decision to adopt Marxist-Leninism as the state ideology was due not only to the ideology of the junior officers who were responsible for this coup, but also to the fact that sectors of the civil society, in particular students, had exerted pressures in this direction.

On 30th November 1975, the country was re-named *République populaire du Bénin* and a single party, the *Parti Révolutionnaire du peuple béninoise* (PRPB), was formed. The ideological choice of the regime was expressed by a major campaign to spread Marxist-Leninism through the mass media and the educational system, which was completely reformed under the name of the "Ecole nouvelle". Moreover, seminars for teachers, the judiciary and the army were organised with this objective. All movements were dissolved and mass political organisations were created. At economic level, a nationalisation programme was elaborated.

The following phase was marked by the attempt by the regime to acquire internal and international legitimisation through the adoption of a constitution. The adoption of the

Constitution was also due to pressures coming from the Beninese legal community, including lawyers, magistrates, judges, notaries and law professors.³⁰⁸

The constitution-making process³⁰⁹ began with the establishment by the Party of a constitutional commission in September 1976. The constitution drafted by the commission according to the Party's directives was presented to Kérékou as President of the Central Committee of the Party and was modified by the Central Committee at its fourth session in January 1977. This text was submitted to a "*campagne de popularisation*" between 22nd May and 30th June 1977 in order to receive the feedback of the population. In fact this exercise was used to give the regime a democratic veneer. Only minor changes, not questioning the constitutional design decided by the Party, were introduced on the basis of the observations raised by the population. The text was then adopted by the National Revolutionary Council, the Revolutionary Military Government and the Central Committee of the PRPB on 26th August and promulgated as the Basic Law of the Popular Republic of Benin ("*Loi fondamentale*") on 9th September.

5.3.4.2 The Marxist-Leninist Option and the Constitution

The 1977 Constitution confirmed the ideological imprint of the regime proclaiming that the "philosophical foundation" of the People's Republic of Benin was Marxist-Leninism and that the state was inserted in a revolutionary process which, as stated in the preamble, had to develop in three stages, i.e. that of the Revolutionary Movement of National Liberation, of the People's Democratic Revolution and of the Socialist Revolution. The socialist inspiration of the constitution turns out from the provision for the unity of powers, the supremacy of the single party conceived as party of avant-guard, the principle of democratic centralism, the collectivist economic orientation, the commitment against imperialism and colonialism and the expression of solidarity with the peoples fighting for liberation as the underpinning principle of Benin's foreign policy.³¹⁰ As it will be described below, also the provisions on human rights were influenced by the socialist conception.

The principle of the unity of powers was realised by concentrating all powers in the National Revolutionary Assembly, which was defined as "the supreme body of State authority" of Benin. The Assembly was composed of peoples' commissioners elected for

³⁰⁸ See Human Rights Watch, *Protectors or Pretenders, Benin*, cit.

³⁰⁹ See A.K. Olobo, "Les institutions de la République populaire du Bénin", in 2 *Revue juridique et politique indépendance et coopération*, 1978, pp. 759-769; A. Paraiso, "La loi fondamentale et les nouvelles institutions de la République populaire du Bénin", in 90 *Penant*, 1980, pp. 287-306.

³¹⁰ On this Constitution see D.G. Lavroff, "L'évolution constitutionnelle", in *Année africaine*, 1977, pp. 108-125.

three years (five from 1984) and vested with legislative power as well as with the power to amend the Constitution (with the exclusion of the socialist orientation of the state) by a two-third majority of its members. The Assembly also elected the President of the Republic upon nomination of the Central Committee of the Party as well as the President of the Supreme Court and the Attorney General. Furthermore, it could exert all other competencies it deemed necessary.

According to the statute of the Party, which complemented the state constitution in the delineation of the state organisation, the President of the Central Committee of the Party was head of State and President of the National Council of the Revolution. The President of the Republic, elected for three years (five from 1984), was the head of State and of Government, as head of the National Executive Council. He was responsible before the Assembly and did not formally wield powers other than those of pardon. The exercise of other powers rested on a proposal or delegation of the Permanent Committee of the Assembly³¹¹ or of the Central Committee of the Party.

Even though the letter of the Constitution defined the Assembly the supreme authority, the real holders of state powers were the executive and, to a greater extent, the Party. This shift of powers in favour of the Party was the natural consequence of the competencies accorded by the Constitution to it, which consisted in the nomination of the persons at the head of the organs of the state including the President of the Republic, the members of the Permanent Committee of the Revolutionary National Assembly, the President of the Central People's Court and the Attorney General of the Central People's Prosecutor's Department. Even the army, which was at the origin of the new regime and was defined as the protector of the interests of the people and of the conquests of the Revolution (Article 10, 3), was subordinated to the Party. Article 10 (1) provided that the People's Armed Forces "are led by the Party of the People's Revolution of Benin and owe fidelity to her". In reality, it is difficult to establish if it is more correct to speak of supremacy of the Party on the State or rather of a confusion of the two considering that the President was the head of the Party and all the ministers were members of the National Council of the Party. Taking into account that the President of the Republic was head of State and of Government and also head of the Central Committee of Party as well as of the army, it is natural that in fact all powers were concentrated in him.

³¹¹ According to the Soviet model, the Constitution provided for an internal body called the Permanent Committee of the Revolutionary National Assembly. This held not only competencies delegated by the Assembly, but also powers attributed directly by the Constitution.

5.3.4.3 Human Rights in the 1977 Constitution and the Human Rights Performance of the Kérékou's Regime

Chapter VII of the 1977 Constitution recognised certain civil liberties including the freedoms of speech, press, correspondence, assembly, association and demonstration (Article 134), religion (Article 135) as well as the right to personal security (Article 136), inviolability of the home and secrecy of correspondence (Article 137) and the freedom of residence (Article 138). Also the right to private property (Articles 21-24 and 26-27) was recognised but was subject to significant limitations. Five types of property were provided, i.e. of the State, of cooperatives, of individual workers, of nationals and of foreigners (Article 128). Only the property of the State and cooperatives was not subject to any limitation. Conversely, the property and the economic activities of foreigners were subject to the condition of being useful to the economy of the country and to the interests of the people of Benin. Furthermore, private property of nationals was subject to two limitations. The first and potentially most constraining one was represented by the sweeping provision according to which "[t]he state prohibits all practices involving the use of the right to own private goods in order to disturb the national economic life, to undermine the economic independence or to obstruct the implementation of the State plan" (Article 25). Moreover, private property could be expropriated, confiscated or requisitioned in case of necessity and for reasons of public interests even without compensation, being this assigned only "if conditions so require" (Article 28).

The right to vote was not constitutionally protected and also in fact it was not implemented. The members of the first Assembly were appointed by the Government and from 1979, when the first elections were held, until 1989 elections consisted in approving or rejecting the candidates proposed by the government and this occurred in a climate of intimidation and coercion and, more generally, in disrespect of any elementary principle of fair electoral procedure. The right to freely participate in the government of the country was thus denied by the limitation of the right to vote and the suppression of any manifestation of dissent, which were complemented by the lack of democracy within the Party.

Independently of their formal recognition, the enjoyment of civil rights was also weakened by the subordination of their enjoyment to the fulfilment of the duties envisaged by the Constitution and the imposition of a state ideology. The emphasis given to duties was not a new feature given the fact that since 1964 all Benin's constitutions provided them. The only difference is the ideological framework in which they were inserted and

correspondingly the centrality of the duty to defend the "Revolution". The duties established by Chapter VII of the Basic Law consisted in the payment of taxes (Article 141), the defence of not only the Fatherland, but also of the Revolution, which was defined as "the most noble and sacred of duties", the fulfilment of military obligations and the permanent mobilisation for the defence of the Fatherland and the Revolution and the resistance against aggression (Article 142).

The impact of the imposition of a state ideology on fundamental rights and freedoms also results from article 12, which subordinated their exercise to the adherence to Marxist-Leninism. Civil rights were indirectly constrained by Article 7, which established that "[a]ll workers in all sections of activity must dedicate themselves to study Marxist-Leninism, ...practice criticism and self-criticism" and "the State particularly watches over the moral, intellectual and physical education of the young on the basis of the principle of Marxist-Leninism" (Article 7). The exercise of these rights was also explicitly eroded by the provision according to which "[n]o citizen ... must abuse his democratic liberties in order to jeopardise State interests, the People and the Revolution" (Article 140). In addition, they were severely conditioned by the provision of a "right of denunciation", on the basis of which citizens "have the right to present to all State bodies ... denunciations or complaints against all moral or physical persons for violation of the law or failure to do their duties" (Article 139).

Independently of what provided by the Constitution, any form of dissent was suffocated through the recourse to violence. Opponents, real or suspected, were subject to arbitrary arrests, detention and torture. One of the first acts of the regime was to put the former heads of state under house arrests except Zinzou, who, after being condemned to death, fled abroad. Former ministers were put in jail. Moreover, the regime formally denied the right to hold public office to entire classes of people such as those linked to the previous regime as well as persons defined as members of the bourgeoisie.³¹²

Consistently with its socialist inspiration, the Constitution in Chapter VII put large emphasis on social and economic rights. The rights protected by the Constitution were the right to work (Article 127); to form trade unions (Article 128); to leisure; to material assistance in old age, in case of illness or inability to work; to education and the freedom of intellectual and cultural creation (Articles 129-132). The Constitution also envisaged the right of women to paid maternity leave before and after childbirth (Article 125) and the

³¹² Allen, Benin, cit., p. 72.

developments of maternities, nursery schools and kindergartens (Article 126). Also their enjoyment was, nevertheless, conceived not as intrinsically valuable but as instrumental to the realisation of the revolutionary principles. The right to work was presented as a right, a duty and an honour like in the 1936 Soviet Constitution. The right to form trade unions was acknowledged, but not that of strike. Furthermore, trade union activities were not recognised as a means for workers to claim their rights and interests, but rather as a tool "to improve the worker's awareness of the proletarian class" and the state's objectives of an "independent economic development and the full satisfaction of the needs of the popular masses" (Article 128). Moreover, "[a]ll activities of national social life ... are organised on this path [of socialism] under the centralised leadership of the Party of the People's Revolution of Benin" (Article 4,2).

An element to be underlined, which confirms that despite formal differences African constitutional systems shared several common features, pertains to the status of women. The principle of equality between men and women, which is part of the basic principles of the socialist human rights conception, was included in the constitution under an ambiguous formulation as far as the private sphere is concerned. Unlike other African countries such as Congo and Madagascar, Benin's constitution did not claim to apply an "African socialism", even though the constitution indicated that Marxist-Leninism had "to be applied vividly and creatively to Benin realities" (Article 3, 2). Moreover, when dealing with the principle of equality between men and women in political, economic, cultural and social matters and, very importantly, within the family (Article 124) Beninese cultural specificities were taken into account. The principle of gender equality was attenuated by the reference to the priority of the value of the family. A sound interpretation of the "just revolutionary principle" of equality in order to safeguard the "unity of the family" was requested: "*[t]outefois, l'unité de la famille doit être sauvegardée sur la base d'une saine compréhension de ce juste principe révolutionnaire d'égalité de l'homme et de la femme*" (Article 124). This caveat was inserted as a compromise solution following the resistances encountered by the provision of equality between men and women during the "*campagne de popularisation*". A derogation to this principle was thus allowed even though not explicitly as in Zambia.

As far as the enforcement of rights is concerned, unlike in Zambia, the liberties formally recognised by the constitution were deprived of any real judicial safeguard. Firstly, justice was conceived as an instrument of the revolution similarly to the Soviet model, where it was understood as a means for the achievements of the goals of the party in conformity with Marxist-Leninist principles. The Benin's Constitution provided that "[j]ustice ... is rendered

in the name of the Benin people and its Democratic and Popular Revolution" (Article 103, 3). This also entailed that judges, in order to be appointed, had to share "*la conviction politique révolutionnaire*".³¹³ Secondly, the independence of the judiciary, which was formally proclaimed (Article 108), was undermined by its responsibility before the Revolutionary Councils of the corresponding administrative levels and their executive bodies (Article 110).³¹⁴ Thus at national level, the Central People's Court was responsible before the Revolutionary National Assembly or its Permanent Committee, the President of the People's Republic of Benin and the National Executive Council (Article 116). Secondly, an attack to the principle of independence of the judiciary came from the presence of special jurisdictions, whose establishment was allowed by the Constitution and left to the discretionary decision of the Party and the Assembly. Article 103 of the Constitution provided that "[w]hen necessary for the judging of special cases, the Central Committee of the Party of the People's Revolution of Benin and the Revolutionary National Assembly may decide to set up courts of special jurisdiction". In 1975 the National Council of the Revolution and later the National Executive Council as well as the Central Committee of the Party exerted the function of special jurisdictions trying political offences. In 1988 the *Cour de Sûreté de l'Etat* was established by law (No. 88-001 of 26 April 1986). This was competent to judge a wide range of crimes including not only "*les infractions connexes aux crimes et délits contre la sûreté de l'état*" and armed rebellion, but also voluntary murders, injuries, thefts ...

According to the Soviet model, the *Parquet Populaire Central* had the responsibility to control the observation of laws by "*les organes locaux du pouvoir d'Etat, les fonctionnaires et les citoyens*" (Article 117). The *Procureur Général* was elected for four years by the National Assembly on a Central Committee's recommendation. According to the Act No. 81-004 of 23 March 1981, his power was confined to the transmission to the relevant administrative organ of his "*protestation*" for the non compliance with the law, but it was the administration itself to have competence to take a decision on it. He could, however, suspend the execution of an illegal act until his "*protestation*" was examined by the competent

³¹³ See Paraiso, *La loi fondamentale*, cit., p. 403.

³¹⁴ The organisation of the judiciary included at national level the Central People's Court, which was composed of both professional and non-professional judges. The former were appointed by the National Executive Council upon advise of the Permanent Committee of the Assembly and the latter were elected by the Revolutionary National Assembly upon a proposition of the Central Committee of the Party. The professional judges of the courts of provincial levels were appointed by the National Executive Council upon advise of the Permanent Committee of the Assembly. The non-professional component was elected by the Revolutionary Councils. The courts of all the others levels were composed of non-professional judges.

administration. Moreover, he could have the illegal act corrected or repealed when at issue was an act or order of detention.

Finally, it should be pointed out that from a human rights perspective the 1977 Constitution of Benin contained certain elements which set it apart other African constitutions, including those of socialist nature. The first element included the reference to the multinational character of the state, even though its unitary nature was also solemnly affirmed. The importance of this provision lies in the fact that nationalities were recognised as right-holders, or more precisely as holders of "equal rights and duties", including the freedom to use their own languages and to develop their culture (Article 3). Moreover, active support was envisaged for the nationalities living in less developed areas. This provision, which was the subject of much debate during the popularisation campaign,³¹⁵ was extremely significant as it constituted an original aspect in the sub-Saharan African constitutions. However, this provision was rather limited as the recognition of the multinational character of Benin was confined to the acknowledgement of the collective right to culture, and it did not go as far as envisaging the recognition of forms of autonomy.

³¹⁵ See Martin, Bénin, p. 33.

CHAPTER 6: A Critical Analysis of the Debate on the Inadequacy of the Liberal Model of Human Rights for Sub-Saharan Africa

This chapter aims to assess the validity of the arguments used by African governments to justify the inadequacy of the liberal model of human rights for sub-Saharan Africa. This analysis is also necessary to appraise the change of perspectives on human rights underlying the current revival of liberal constitutionalism in sub-Saharan Africa. The shift from a widespread questioning of the liberal notion of human rights to an almost complete adherence carries the risk of failing to address the real issues posed by the criticism of the past. The purpose of this chapter is, therefore, to reflect on the universal validity of the liberal model of human rights through a critical analysis and a theoretical reformulation of the debate which took place in sub-Saharan Africa. This should finally provide the tools to evaluate the potential for entrenching today of the liberal human rights model in contemporary sub-Saharan Africa. Moreover, an examination of the debate developed by African countries could be used as an instrument to critically evaluate current debates on the universality of human rights beyond the African experience. The universal value of the liberal concept of human rights is still the subject of both scholarly debate and political disagreement in the international arena, which is dominated by criticism of a universal perspective on human rights by some East Asian governments.³¹⁶ Their arguments closely resemble those which were put forward by African leaders until the late 1980s and early 1990s.³¹⁷

6.1 The Cultural Argument: the Liberal Model of Human Rights as “Western” and Alien to African Culture

As seen in the preceding chapters, a broad definition of culture encompassing the “totality of values, institutions and forms of behaviour transmitted within a society”,³¹⁸ was one of the

³¹⁶ See Kausikan, “Asia’s Different Standard”, in 92 *Foreign Policy*, 1993, p. 24-41 and M. Kishore, “The Pacific Way”, 74 *Foreign Affairs*, 1995, pp. 100-111. The former author was a governmental official and the latter was the permanent secretary of the Ministry of Foreign Affairs in Singapore. Today, in Singapore “communitarianism, aimed at some notion of common good or collective well-being, is used to justify state intervention in all spheres of social life and a legal regime that seriously violates individual rights and inhibits public discourse... In this political context communitarianism may often mean authoritarianism”; M.C. Davis, “Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values”, in 11 *Harvard Human Rights Journal*, 1998, p. 128.

³¹⁷ One important difference between the positions of East Asian and African governments consists in the criticism voiced by the former with regard to economic and social rights which were considered as a priority in the African discourse on human rights.

³¹⁸ R. Preiswerk, “The Place of Intercultural Relations in the Study of International Relations”, in 32 *The Yearbook of World Affairs*, 1978, p. 251, quoted in A.A. An’Naim (ed.), *Human Rights in Cross-Cultural Perspectives*, University of Pennsylvania, Philadelphia, 1991, p. 23.

strongest arguments used by African governments to challenge the liberal model of human rights. In relation to this argument, a critique and reformulation of the concepts employed in this debate will be outlined. This conceptual clarification is aimed at providing a more articulated and complex interpretation of African culture than the one used in the debate. Finally, with regard to this redefined notion of African culture, the relevance of the liberal human rights model for sub-Saharan Africa will be dealt with.

6.1.1 A Reformulation of the Debate: Two Opposing Concepts of Human Dignity

African leaders did not dismiss the relevance of the idea of human rights for Africa. Instead, it was the inclusion of the liberal model of human rights in their constitutions which was rejected. It is important to underline that this challenge was, in fact, accompanied by the claim that traditional African cultural and socio-political systems embodied an alternative conception of human rights grounded on a communitarian perception of the human person. This two-fold claim that the conception of human rights included in independence constitutions was culturally alien to Africa and African has produced its own idea of human rights was put forward by African leaders, among whom Kaunda was one of the most eloquent representatives. However, it is important to note that this debate was not confined to the political arena. This claim has also been strongly made by several scholars³¹⁹ who have underlined that the liberal underpinning of human rights (i.e. the individualistic view of the person as an autonomous being separate from and in need of protection from other individuals, the state and society) is in sharp contrast with the African understanding of personhood. In African culture, personhood is an attribute which depends on the membership of a community (family, clan, kinship group or tribe) and its existence rests on the fulfilment of obligations to the group, which in turn, are determined by the status of the individual within it.³²⁰ However, it is argued that this conception does not deny the existence of human

³¹⁹ A. Pollis and P. Schwab, "Human Rights: A Western Construct with Limited Applicability", in A. Pollis and P. Schwab (ed.), *Human Rights. Cultural and Ideological Perspectives*, Praeger Publishers, New York, 1979, p. 1 seq.; C.C. Mojekwu, "International Human Rights: The African Perspective", in J.L. Nelson and V.M. Green (eds.), *International Human Rights: Contemporary Issues*, Human Rights Publishing Group, Standfordville, N.Y., 1980, pp. 85-95; A. Legesse, "Human Rights in African Political Culture", in K.W. Thompson (ed.), *The Moral Imperatives of Human Rights: A World Survey*, University Press of America, Washington D.C., 1980, pp. 123-138; Y. Khusahlani, "Human Rights in Asia and Africa", in 4 *Human Rights Law Journal*, 1983, p. 418; C. E. Welch Jr., "Human Rights as a Problem in Contemporary Africa", in Welch and Meltzer (eds.), *Human Rights and Development*, cit., pp. 11-30; L. Marasinghe, "Traditional Conceptions of Human Rights in Africa", in ibidem, pp. 32-45; L.O. Adgebeite, "African Attitudes to the International Protection of Human Rights", in A. Eide and A. Schou (eds.), *International Protection of Human Rights*, Proceedings of the Seventh Nobel Symposium, Oslo, September 25-27, 1967, Interscience Publishers, 1968.

³²⁰ I.A. Menkiti, "Person and Community in African Traditional Thought", in R.A. Wright (ed.), *African Philosophy: An Introduction*, New York, University Press of America, 1984, pp. 171-181; R. Verdier,

rights. The participatory, yet consensual, form of decision-making processes, the controls in place on the power of rulers which could lead to their removal and, finally, the distributive character of African economies provide some evidence that these rights exist. Within this reconstruction, the specificity of the African conception of human rights rests upon the fact that the group³²¹ is the holder of rights, and, consequently, individuals only enjoy them as components of this group.

However, the second part of the cultural argument, in other words, the claim that traditional African culture included its own conception of human rights which individuals enjoyed within a communitarian social organisation is questionable. There are two main problems with this contention, which concern both the employment of the term human rights to describe the relationship between the individual and the community and the factual correctness of this description.

The claim that traditional African systems and culture enshrined a notion of human rights assumes, on the one hand, that the concept of human rights is equated with the notions of human dignity and of limited government.³²²

Human rights are, indeed, one of the possible ways of conceiving the protection of human dignity, which can be defined as "the inner (moral) nature and worth of the human person and his or her proper (political) relations with society".³²³ The understanding of human dignity is to a large extent culturally determined and, in this way, different cultures may envisage alternative mechanisms for its protection.³²⁴ In African traditional culture human dignity is conceived in communitarian terms and, therefore, its protection is assured not by guaranteeing the individual a sphere of autonomy from the rest of society, as in the liberal

"Problématique des droits de l'Homme dans les droits traditionnels d'Afrique noire", 5 *Droits et cultures*, 1983, pp. 97-103; N. Rouland, "La tradition juridique africaine et la réception des déclarations occidentales des droits de l'homme", 26 *Droits et Cultures*, 1993, p. 197.

³²¹ Mojekwu, International, cit., p. 86; Legesse, Human Rights, cit., p. 128 who has written that "[i]f Africans were the sole authors of the Universal Declaration of Human Rights, they might have ranked the rights of communities above those of individuals".

³²² The idea of limited power is not necessarily linked to the idea of individual rights. In the liberal constitutional tradition, the limitation of power is instrumental to the guarantee of the enjoyment of rights, however, in the African context, it had a holistic meaning as it was used for the protection of the community; see J. Donnelly, "Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Right", in 76 *American Political Science Review*, 1982, p. 303-316 and R. Howard and J. Donnelly, "Human Dignity, Human Rights and Political Regimes", in 80 *American Political Science Review*, 1986, p. 801-817.

³²³ Howard and Donnelly, Human Dignity, cit., p. 802.

³²⁴ On the cultural relativity of the notion of human dignity, see O. Schachter, "Human Dignity as a Normative Concept", 77 *American Journal International Law*, 1983, p. 848 and p. 853 and R. Howard, "Dignity, Community and Human Rights", in An-Na'im, Human Rights in Cross-Cultural, cit., p. 83 where she has revised her definition of human dignity as "the particular cultural understandings of the inner moral worth of the human person and his or her proper political relations with society".

system, but through the performance of duties by each member of the community according to his or her status within it. The combination of these complementary and mutual obligations guarantees that the individuals' human dignity will be respected by ensuring them physical and psychological security. Although the protection given may correspond with the substance of specific human rights, having rights (i.e. entitlements which can be claimed towards other individuals or the community) is a different issue. The contradictions arising from the use of the term of human rights to depict communitarian African society is clear from this statement made by Marasinghe that the right to free speech, the freedom of association, belief and property "are fundamental only in abstract. In fact, they are limited according to the needs of each extended family, as determined by the collective wisdom of its family council".³²⁵

A further and often neglected feature of African traditional social systems which undermines the correctness of the description of the human rights regime in traditional African societies is that entire categories of individuals are excluded from the enjoyment of 'rights'³²⁶ and those who are included enjoy them to varying degrees according to their status, sex and age.

The reconstruction of the position of the individual in traditional Africa in terms of human dignity does not *per se* weaken the force of the challenge of the cultural argument against the introduction of the Western idea of human rights. It simply raises the issue of a reformulation of the problem in terms of a clash between two different conceptions of human dignity rather than human rights, according to one in which human dignity is considered to be in need of protection from the community which is seen as a potential threat and in the other, in which the community is its source of protection.

The debate was also biased by the confusion between the liberal conception of human rights and the "Western" model of human rights. Since the aftermath of the World War II, Western constitutionalism has incorporated social and economic rights as integral part of human rights. In fact the paradox of the African constitutional experience was the inheritance of a purely liberal human rights model from the colonial master, which they themselves had found incomplete. In reality, Western constitutionalism also embodies the idea that the

³²⁵ Marasinghe, *Traditional*, cit., p. 3.

³²⁶ Some members of society, i.e. slaves, outcasts, strangers, some categories of women such as childless women did not enjoy any protection; see Mojekwu, *International*, cit. p. 86; Adgebeite, *African Attitudes*, cit., p. 69 and O.C. Eze, *Human Rights in Africa. Some Selected Problems*, The Nigerian Institute of International Affairs, Lagos, 1984, pp. 13-14. These authors, nevertheless, do not dispute the use of the terminology of human rights. Even Eze, who is very critical of the "romantic view" on African society merely speaks of "institutionalised derogation from human rights", see p. 13.

community has positive obligations towards individuals and that the members of the community share links of solidarity.

6.1.2 The Instrumental Use of the Concept of Culture

Even though the notion of human rights is not part of traditional African culture, it cannot be overlooked that the cultural argument has been instrumentally used to justify authoritarianism by African governments. In this respect, it has to be remarked that a problematic aspect of any discourse dealing with culture is the frequent disregard for the subjects that are legitimate or competent to determine and disclose to the outside world what constitutes the essence of culture. In this regard, it is important to emphasise how cultural interpretation is not a governmental function, and, moreover, government élites do not usually share the same culture as the governed, and often adopt developmental policies that are inconsistent with traditional culture.³²⁷ In general, they tend to ignore either the plurality of cultures existing within the state or the pluralism of perspectives present within each culture. Therefore, the African cultural challenge was biased as it was conducted on the basis of an interpretation of culture given by subjects lacking both epistemological and moral competence.³²⁸

Moreover, the portrayal of African culture and the conclusions, reached on the irrelevance of the liberal model of human rights was grounded on an interpretation of culture as an ontological, static and homogeneous unit. This concept has undergone a deep transformation in the last ten to fifteen years in both anthropology³²⁹ and sociology.³³⁰ Despite the fact that much of this scholarly reflection is linked to the phenomenon of globalisation, the redefinition which followed is also relevant to post-colonial African society before globalisation. Social, political, economic and cultural contact between different worlds has always taken place, even though on a lesser scale than today. In sub-Saharan Africa,

³²⁷ See M. Freeman, "Human Rights and Real Cultures: Towards a Dialogue on 'Asian Values', in 1 *Netherlands Quarterly of Human Rights*, 1998, p. 28.

³²⁸ See *ibidem*, p. 28.

³²⁹ It is this understanding of culture that has grounded the relativist position which has long dominated anthropologists' work, of which the statement that the American Anthropological Association submitted to the Commission on Human Rights drafting the Universal Declaration in 1947 represents a significant expression; see American Anthropological Association, "Statement on Human Rights", 49 *American Anthropologist*, 1947, p. 539 et seq. This states that: "... if the essence of the Declaration is to be, as it must, a statement in which the right of the individual to develop his personality to the fullest is to be stressed, then this must be based on a recognition of the fact that the personality of the individual can develop only in terms of the culture of his society". For a critical review of the way anthropology dealt with the notion of culture and how this affected the way anthropologists confronted the issue of human rights and the need for a "reconceptualisation" of culture, see A.-B. S. Preis, "Human Rights as Cultural Practice: An Anthropological Critique", in 18 *Human Rights Quarterly*, 1996, pp. 286-315 and also R.A. Wilson, "Human Rights, Culture and Context: An Introduction", in R.A. Wilson (ed.), *Human Rights, Culture & Context*, Pluto Press, London, 1997, pp. 1-27.

³³⁰ For a critique of this portrayal of culture, see Howard, Commonwealth, cit., pp. 23-26.

colonisation also involved the encounter between African traditional social, political and economic systems and the economic and political structures introduced by Europeans.³³¹

It is precisely this awareness of the open nature of culture which calls into question the idea that it is a static and homogenous entity, endowed with rigid borders that separate it from equally static and homogenous entities of the "other" cultures. In reality, culture communicates and develops, losing its "purity" through communication. For this reason, it can be more appropriately described as a process, rather than as an entity.³³²

Furthermore, culture is not homogeneous. It is not correct in fact to speak- as it has been done at both the political and scholarly level- of an African culture or even "non-Western" or "Third World countries" culture,³³³ as it ignores the different cultures existing within the African continent, the region of sub-Saharan Africa and also within the broad category of the Third World. Culture is not a coherent unit but rather a composition of different and sometimes even conflicting universes as "[p]eople participate in multiple, more or less discrepant, universes of discourse; they construct different, partial and simultaneous worlds in which they move; their cultural construction of reality springs not from one source and is not one piece".³³⁴ Culture is "multivocal"³³⁵ or as Jonathan Friedman has stated, it is "an enormous interplay of interpretations of a given social reality".³³⁶ Different groups, which can be distinguished on the basis of sex, age, economic and social status participate in different cultural worlds. Culture is "a tissu-réseau de communication" among the various social actors with many different interests.³³⁷ Therefore, a generic discussion about an African culture overlooks its plural dimension, and questions the validity of the argument against the universality of the liberal conception of human rights. In particular, it is erroneous to believe that a common cultural understanding could unite the African educated élites, and the urban and the rural communities. In fact, African culture is more complex than is portrayed in the discourse against "Western" human rights, in the same way as the social fabric of sub-Saharan Africa. The studies carried out in the preceding chapters provide evidence of the complexity of African culture in the context of its distinct legal culture, which following the words of

³³¹ See J-F. Bayart, "Africa in the World: A History of Extraversion", in 99 *African Affairs* 2000, pp. 218, in which it is argued that sub-Saharan Africa was included in the world economic system before colonisation.

³³² Wilson, *Human*, cit., p. 9.

³³³ This is the case of Pollis and Schwab; see *Human Rights*, cit., pp. 1-18.

³³⁴ F. Bart, "The Analysis of Culture in Complex Societies", in 3-4 *Ethnos*, 1989, p. 120.

³³⁵ P. Rabinow and W.M. Sullivan (eds.), *Interpretative Social Science. A Reader*, University of California Press, Berkeley, 1979, p. 6.

³³⁶ J. Friedman, *Cultural Identity and Global Process*, Sage, London, 1994, p. 73.

³³⁷ N. Intessiloglou, "Système juridique et culture: une approche sociologique globale du phénomène juridique", in F. Chazal and J. Commaile (dir.), *Normes juridiques et régulation sociale*, LGDJ, Paris, 1991, p. 393.

Lawrence Friedman, represent the "ideas, attitudes, expectations and opinions about law, held by people in some given society".³³⁸ For example, the study of the Zambian constitutional process and human rights case law demonstrated the pluralism existing within both the internal and external legal culture.³³⁹ With regard to the former, we have seen how the Zambian judiciary did not always support the view that the communal interest of the nation (i.e. the community) should prevail over individual rights. In regard to individual rights, the majority of citizens who participated in the 1973 Zambian constitutional process, which mainly included those with a high level of education, called for the preservation of the Bill of Rights from the 1964 Constitution. Therefore, this provides clear evidence that at least part of Zambian society not only felt that the liberal model of human rights was culturally acceptable, but also considered it as a necessary component of their country's constitutional system.

A further aspect to be considered concerns the sources used in the debate which gave the substantive content to the abstract notion of culture. In a discourse which uses culture as a basic premise, the degree of "invention"³⁴⁰ which is it embodied cannot be ignored. It should not be overlooked that the cultural relativist discourse is based on traditional African culture as it emerges from reports and documents drafted by Western ethnographers between the late nineteenth and early twentieth centuries on the basis of descriptions given by a small section of African society, such as African chiefs and some Africans who were educated by missionaries. The outcome was a biased exposition which, on the one hand, corresponded to the European colonial administrators' ideal categories and policies, and, on the other hand, legitimised the power positions of African chiefs and educated élite. These sources not only provided an incomplete perspective on African socio-political systems and culture, but they also turned the "loosely defined and infinitely flexible"³⁴¹ African customs into rigid rules, which prevented them from adapting to the changes that had been taking place in society. While it may be unfeasible to separate the invented from the real, it is worthwhile, however, to take into account that the whole debate was conducted on the basis of a static notion of culture, which is not only incorrect from a sociological point of view as stressed above, but

³³⁸ L.M. Friedman, "Is There a Modern Legal Culture?", in 7 *Ratio Juris*, 1994, p. 118 and *The Republic of Choice: Law, Authority and Culture*, Harvard University Press, Cambridge, Mass., 1990, p. 213.

³³⁹ These concepts refer respectively to the legal culture of legal professionals and the lay public (both individuals and groups), see L. M. Friedman, *The Legal System: A Social Science Perspective*, Russel Sage Foundation, New York, 1975.

³⁴⁰ On the concept of "invented tradition", which is not a phenomenon confined to sub-Saharan Africa, see E. Hobsbawm and T. Ranger, *The Invention of Tradition*, Cambridge University Press, Cambridge, 1983. The levirate marriage is an example of a Zambian traditional practice, which was "re-interpreted" and altered. The levirate marriage was presented in terms of "widow inheritance". Under this classification, women were depicted as a property of the deceased husband's family, which was not the traditional African perception.

³⁴¹ T. Ranger, "The Invention of Tradition in Colonial Africa", in *ibidem*, p. 247.

also from a legal anthropological perspective which reminds us that African customs and the culture which they express were extremely adaptive to social developments. Consequently, the rigid defence of African culture in a given period is in sharp contradiction with its very nature.³⁴²

In addition, both scholars (with a few exceptions) and African leaders gave a romanticised view of African political tradition, by excluding the features which could be considered incompatible with it, and particularly with the participatory, consensus-seeking and communitarian description. As a matter of fact, the whole discourse on the consensual and participatory nature of African political systems took place without referring to the fact that this political model applied to sub-Saharan African political entities which were not only small, stateless communities,³⁴³ but also powerful empires,³⁴⁴ some of which did not have any separation of powers, as in the case of the Kingdom of Dahomey, in present-day Benin.³⁴⁵ Furthermore, the non-competitive nature of small, stateless communities in Africa has been over-emphasised to some extent. In reality, although traditionally an outspoken opposition was not voiced, it is not correct to assert that disagreement was not expressed. At the end of the discussions there was always someone who did not conform to the prevailing opinion, thus giving rise to a majority and a minority.³⁴⁶ Certain societies, such as of the Luo in Kenya, even possessed various forms of opposition among its factions.³⁴⁷ Nevertheless, the rhetoric

³⁴² See Chapter 9.

³⁴³ Within the great variety and fluidity of African traditional political systems, it is possible to distinguish between "*sociétés an-étatique*" and "*sociétés à Etat*". The former were organised along clan membership and did not feature any centralised power. Indeed, power was spread among transversal classes such as those based on age. The chief of the community was a leader and not a ruler, i.e. he merely directed the activity of the community. The latter political system had a centralised authority and was represented by legislative, executive and judicial apparatus; see P.-F. Gonidec, *L'Etat africain*, LGDJ, Paris, 1985, pp. 31-37 and M. Fortes and E.E. Evans-Pritchard, *African Political Systems*, Oxford University Press, London, 1970 (first published in 1940), pp. 5-6. In the former societies, the chief was chosen by the village councils of elders and could not adopt binding decisions for the community. Moreover, if he violated customary norms or abused his powers he was removed. In the latter societies, however, generally there were control mechanisms on the ruler because his power was counterbalanced by institutions such as the chief's council, councils of elders, sacerdotal officials or aristocratic dynasties. The abuse of power or the breach of his obligations could provoke a revolt or secession led by subordinate chiefs; see M. Fortes and E.E. Evans-Pritchard, *African Political*, cit., p. 12 and P.-F. Gonidec, "Constitutionalismes africains", in 8 *African Journal of International and Comparative Law* 1996, p. 2. For an example of the former kind of societies in Zambia, see A.I. Richards, *The Political System of the Bemba Tribe-North-Eastern Rhodesia*, in Fortes and Pritchard, *African Political*, cit., pp. 83-120. For a similar organisation in the territory which corresponds to Benin, see J. Lombard, "Chieftancy among the Bariba of Dahomey", in M. Crowder and O. Ikime (eds.), *West African Chiefs*, Universe of Ife Press, New York, 1970, pp. 124-133.

³⁴⁴ This refers to the case of Benin. In the 18th century, southern Benin was controlled by the kingdoms of Porto-Novo and Dahomey and also the kingdoms of Allada and Ouidah, before being respectively conquered and destroyed by the latter at the beginning of the century, A Yoruba Kingdom was also present until 1885. The North was divided among the Bariba kingdoms of Nikky, Parakou, Kouandé, Kandi and Djougou.

³⁴⁵ See J. Lombard, "The Kingdom of Dahomey", in D. Forde and P.M. Kerry (ed.), *West African Kingdoms in the Nineteenth Century*, Oxford University Press, London, 1967, pp. 70-91.

³⁴⁶ Gonidec, *Constitutionalismes*, cit., p. 14-15.

³⁴⁷ See P. Quantin, "Les élections en Afrique: entre rejet et institutionnalisation", in 9 *Revue camerounaise de*

of African consensualism has tended to ignore political experiences which did not conform to the model that it wanted to promote. As Bayart has warned, a “*substantialiste*” approach to culture, obscures the relationship of culture and politics. This cannot be seen as a relationship of two distinct entities, as the former is the subject of “*stratégies identitaires*” pursued by specific and identifiable actors.³⁴⁸ This does not mean that human rights were a concept belonging to African culture before its encounter with European categories. What it means is that African leaders purportedly emphasised selected aspects of African culture and presented them as immutable in order to preserve their position of power. Moreover, as argued in the following sections, traditional African values are not incompatible with the concept of human rights. On the contrary, the denial of human rights in the name of traditional culture may lead to a denial of these values, given the changes that occurred in the African socio-political structures.

6.1.3 Culture in Socio-Political Context and the Denial of Traditional African Values: Human Dignity and Limited Government

The whole debate at both political and scholarly level was mainly conducted outside the context of the radical structural changes which occurred in sub-Saharan Africa since colonisation. In this regard, as Pollis has underlined,³⁴⁹ it is necessary to develop both a theoretical framework and to carry out empirical studies which take into account the socio-economic and political context in which culture is embedded. The issue of the relevance of “Western” human rights needs to be considered in a contextual perspective. More specifically, this involves a consideration of the repercussions of the introduction of the market economy on the traditional social and political systems, as well as of the impact of the import of modern state.

The market economy, labour migration and urbanisation introduced through colonisation, strengthened by the development policies of African governments, had a disruptive effect on the traditional subsistence economy, and weakened the communitarian ties of African traditional communities.³⁵⁰ This was not only an African phenomenon, as communitarianism is not a feature exclusive to African societies. Every traditional, pre-

science politique, Numéro spécial, 2001/2002 at <http://www.cean.u-bordeaux.fr/polis>

³⁴⁸ J.-F., Bayart, *L'illusion identitaire*, Fayard, Paris, 1996.

³⁴⁹ A. Pollis, “Cultural Relativism Revisited: Through a State Prism”, in 18 *Human Rights Quarterly*, 1996, pp. 323-324.

³⁵⁰ See Howard, *Human Rights in Commonwealth*, cit., pp. 22-26 and pp. 39-40. By 1982, 45 percent of the population in Zambia was urban; see The World Bank, *Accelerated Development in sub-Saharan Africa*, Washington, D.C., 1981, Table 36.

capitalist societies possessed communitarian traits. Indeed, the African experience is comparable to the one Europe underwent during the industrial revolution in the seventeenth and eighteenth centuries when the development of the capitalist economy and the phenomenon of urbanisation eroded the communal structures which dominated the feudal period.³⁵¹

The present-day crisis of the traditional community structure and the individualisation of the person challenge the relevance of the traditional communitarian conception of human dignity. It also questions the corresponding rejection of liberal rights. Disputing the human rights protection of human dignity on the basis of its cultural 'foreignity', in a context where traditional communitarian forms cannot operate any longer, could deprive the individual of all forms of protection. The priority of the good of the community and a conception of human dignity based on the fulfilment of obligations has a rationale as long as there is a mutuality of duties. When this network of duties does not exist any longer, only unilateral obligations remain, which fail to benefit the community as a whole, and instead only serve individuals purporting to speak on its behalf.

The fact that the concept of human rights has a Western origin does not necessarily mean that it is not relevant for other cultures. The justification of their validity outside the Western world is linked to the export of what Pannikar has called the "*megamachine* of the modern technological world" by the Western powers, within which "for an authentic human life to be possible ... Human Rights are imperative".³⁵²

The relevance of an approach which takes into account the structural context in which a particular culture develops is also crucial for addressing the core of the debate on the "Western" model of human rights, in other words the possibility of claiming rights against the government. The contention that due to their adversarial nature civil and political rights were culturally alien and, therefore, irrelevant for sub-Saharan Africa has often been made without recognising that political power was not organised in post-colonial Africa in the same form as in pre-colonial Africa. In post-colonial sub-Saharan Africa, political power has taken the shape of a modern state of European origin, thus replacing traditional political structures. However, the imported idea of the nation-state was never challenged as the large emphasis on national unity demonstrates. In fact, the communitarian African tradition was presented as an obstacle to the import of an individualistic conception of rights but was also disregarded when

³⁵¹ J. Donnelly, *Human Rights in Theory and Practice*, Cornell University Press, Ithaca and London p. 69-71 and I. Szabo, *Historical Foundations of Human Rights and Subsequent Developments*, in Vasak and Alston, *The International*, cit., p. 13.

³⁵² Pannikar, "Is the Notion of Human Rights a Western Concept", in 120 *Diogenes*, 1982, p. 175.

the claims of the diverse ethnic communities within the African states were at issue.³⁵³ The 1979 constitution of Benin represents an exception to this contention.³⁵⁴ However, in the majority of cases, the approach taken on the question of ethnic pluralism was similar to the liberal states. Hence, the argument against liberal rights suffers from a serious contradiction. On the one hand, African leaders accepted and even defended the modern liberal state to the detriment of African traditional political entities, and on the other hand, they challenged liberal rights, which were historically conceived as a guarantee with respect to "the growing power of the nation state and its extending capacity to determine and control the life of its subjects".³⁵⁵ This contradictory dichotomy (the defence of the modern state and the rejection of liberal rights) was purported to be resolved by claiming that it was possible to reproduce African traditional consensual and democratic form of politics within the framework of the modern state. However, the analysis of the political experience of Zambia has shown that African one-party systems did not bring about any efficient mechanisms for either a tangible popular participation or a constraint on the political power. The problem lies in the assumption that it is possible to recreate within the modern state, the same consensual model of politics which historically developed within the non-state, small-scale communities, or in other words, to equate the modern state with the traditional community. The two forms of organising power are, conversely, radically different. While "[t]he community, for the most part, depends on popular norms developed through forms of consensus and enforced through mediation and persuasion. The state is an imposition on society, and unless humanised and democratised... it relies on edicts, the military, coercion and sanctions."³⁵⁶ The administrative and coercive bodies through which the modern state exerts its authority on society were, indeed, absent in the pre-colonial African societies. Moreover, the centralisation of power and its depersonalisation which, using Weber's typology,³⁵⁷ marks the passage from the traditional to legal-rational type of authority, render the control on the authority more complex. Even the presidentialist forms of government introduced in African single-party systems did not suppress the institutional complexity of the modern African state. Moreover, the territorial organisation of the modern state questions the viability of any comparison between the single-

³⁵³ The same contradiction can be found in the human rights discourse made today by East Asian governments, see Ghai, Human, cit., p. 16.

³⁵⁴ Article 3 of the Zambian constitution only provided for a House of Chiefs with advisory powers.

³⁵⁵ D. Castiglione, "The Political Theory of the Constitution", in R. Bellamy and D. Castiglione (eds.), *Constitutionalism in Transformation: European and Theoretical Perspectives*, Blackwell Publishers, Oxford, 1996, p. 22.

³⁵⁶ Ghai, Human, cit, p. 17.

³⁵⁷ M. Rheinstein (ed.), *Max Weber on Law in Economy and Society*, Harvard University Press, Cambridge, Mass., 1954.

party and the consensual system of decision-making, which was also linked to the weak social stratification, which existed in traditional African societies.³⁵⁸ As emphasised by Nwabueze, the frequent comparison between the single-party and traditional decision-making assembly is flawed:

*"[w]hile it is true that political parties, as such, did not exist in so-called traditional African societies, it also follows logically that the concept of political party cannot be used in analyzing politics in pre-capitalist African societies. People who justify the one-party system on the basis of our cultural heritage have, therefore been essentially involved in false analogies."*³⁵⁹

This equation has also led to a betrayal of African constitutionalism, as depicted, and at times romanticised, by African leaders themselves. In this regard, scholars such as Keba M'Baye have presented this by arguing that African traditional culture embodies a concept of human rights which corresponds to the Western model. According to M'Baye, even though they were not clearly articulated, the right to life, expression, education and the freedoms of religion, association, movement and work were recognised in traditional Africa. As argued above, the fact that life, education or the freedom of expression and association were respected, does not mean that they constituted individual entitlements as the term human rights suggests. M'Baye has admitted this observing that the African specificity consists in the fact that rights are presented from the perspective of the corresponding duties and are not perceived in conflictual terms.³⁶⁰ However, what can be said is that traditional African culture encompassed forms of guarantee of human dignity. In a similar way, many scholars have indicated that Africa also had a political tradition of limited government and political participation. In this sense, modern African states have betrayed traditional African constitutionalism. Furthermore, the value of social harmony emphasised by African leaders was certainly not achieved in traditional Africa by stifling divergent opinions, as in post-colonial Africa, but through a patient mediation among the various existing views until consensus was reached. Preventive detention measures, sedition laws and press censorship cannot be explained by invoking the African consensual political culture.

³⁵⁸ R. Howard, "Evaluating Human Rights in Africa: Some Problems of Implicit Comparisons", in 6 *Human Rights Quarterly*, p. 176.

³⁵⁹ Nwabueze, *Constitutionalism*, cit., pp. 168-169.

³⁶⁰ K. M'Baye, *Human Rights in Africa*, in Vasak and Alston, *International*, cit., pp. 589-591 and *Les droits de l'homme en Afrique*, Pédone, Paris, 1993 pp. 53-55. See also H. Hannum, "The Butare Colloquium on Human Rights and Economic Development in Francophone Africa: A Summary and Analysis", 1 *Universal Human Rights*, 1979, p. 64; D.M. Wai, "Human Rights in Sub-Saharan Africa", in Pollis and Schwab, *Human Rights*, cit., p. 115-144 and S.B. Asante, "Nation Building and Human Rights in Emergent African Nations", 2 *Cornell International Law Journal*, 1968, pp. 72-107.

In reality, the stark rejection (as in Benin) or the "corrections" (as in Zambia) to the liberal human rights model on the ground of its being culturally alien led in the denial of two ideals belonging to African culture, namely, human dignity and limited government.

6.2 The Structural Argument: The Liberal Model of Human Rights as an Obstacle to Development

The second argument on which the relevance of the liberal model of human rights was challenged was linked to the structural condition of underdevelopment in sub-Saharan Africa. According to this argument, the need for an effective policy to correct this situation would make the exercise of civil and political rights a "luxury" whose guarantee should be postponed until after the problem of underdevelopment had been solved. In this way, it was argued that civil and political rights could hinder government action and, therefore, act as an obstacle to development.

It is important to note that this discourse is not isolated to an African view of the relationship between human rights and development and, for this reason, the relevance of its debate goes beyond the African borders.

The thesis that it is necessary to temporarily constrain human rights in order to adequately face underdevelopment and that human rights are an outcome and not a precondition of development was also a leading theme in political science, in particular between the 1960s and the 1970s. This perspective was still common in the early 1980s.³⁶¹ Since then, this thesis has undergone a critical re-thinking and a positive link between human rights and development has been progressively recognised and the 1990s marked a turning point in this regard. Since then the need to integrate human rights in development has been increasingly recognised. At the Vienna World Conference on Human Rights in 1993, consensus was reached that democracy, development and human rights are interdependent and mutually reinforcing.³⁶² In June 2000, the special session of the General Assembly, entitled "World

³⁶¹ See, e.g. S.P. Huntington, "Political Development and Political Decay", 17 *World Politics*, 1965, pp. 386-430; S.M. Lipset, "Some Social Requisites for Democracy: Economic Development and Political Legitimacy", in 53 *American Political Science Review*, 1959, pp. 69-105. On this issue, see J. Donnelly, "Human Rights and Development: Complementary or Competing Concerns?", in 36 *World Politics* 1983/84, pp. 255-283 and R.L. Barsh, "Democratization and Democracy", in 14 *Human Rights Quarterly*, 1992, pp. 124-126.

³⁶² See *Vienna Declaration and Programme of Action*, Distr. GENERAL A/CONF. 157/23 12 July 1993 available at <http://www.unhchr.ch/html/menu5/d/Vienna.htm>. See also the interdependence of development and civil and political rights in *Question of the Realization in All Countries of the Economic, Social and Cultural Rights Contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights, and Study of Special Problems which the Developing Countries Face in Their Efforts to Achieve These Human Rights*, U.N. ESCOR, Commission on Human Rights, 54th Sess., 51st mtg., 4(d), U.N. Doc. E/CN.4/1998/33 (1998), at <http://www.unhchr.ch/tml/menu4/chrres/1998.res/44.htm>

Summit for Social Development and Beyond: Achieving Social Development for All in a Globalizing World”, expressed the belief that “the promotion and protection of all human rights and fundamental freedoms, including the right to development” are “some of the essential elements for the realisation of social and people-centred sustainable development”.³⁶³ Since the 1995 World Summit for Social Development, development has been defined as “social” development with the human person as its core concern.

Similarly, since the 1990s, agencies working in the field of development have begun to show an interest in human rights and a human rights approach to development has been increasingly advocated. This has been defined as the operational expression of the link between development, defined as human development and human rights. It expresses “a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights”.³⁶⁴ In this way human rights are not considered an afterthought of development. Both civil and political rights and socio-economic and cultural rights assist in setting the goals, as well as the acceptable costs of development agendas. Within this approach, the beneficiaries of development are conceived as rights-holders, and consequently, they are not the passive recipients of models of development “generously” supplied by others, but rather the “directors” of development. This involves an active, free and meaningful participation.³⁶⁵ It does not deny that the realisation of development depends upon the availability of resources and the existence of institutions. The existing capacities necessarily affect the policy choices for the advancement of a development in which human rights are an integral objective. Capacity constraints require the setting of priorities, however this process should be carried out with the participation of the people concerned.³⁶⁶

It is in this context that financial institutions, which traditionally refused to take human rights into account, have started considering civil and political rights as a fundamental aspect for development. The World Bank’s emphasis on “good governance”,³⁶⁷ which refers to transparency, accountability and the rule of law, as a condition for development represents an indirect recognition that this can only be achieved in a situation where civil and political

³⁶³ See also the *Copenhagen Declaration on Social Development and Programme of Action* adopted at the 1995 World Summit for Social Development endorsed by the UN General Assembly in resolution 50/161.

³⁶⁴ U.N. Office of the High Commissioner for Human Rights, *Human Rights in Development: What, Why and How*, Geneva, 2000.

³⁶⁵ See Article 2(3) of the UN Declaration on the Right to Development.

³⁶⁶ See UNDP, *Human Development Report*, 2000. This Report argues the mutually reinforcing link between human rights and development, emphasising the need for an integrated approach in this regard.

³⁶⁷ See World Bank, *Governance and Development*, Washington D.C., 1992.

rights (at least those encompassed by the concept of good governance) are guaranteed. However, the above description is not complete as the 'liberty trade-off' argument continues to be advanced by Southeast Asian governments, which link the respect for traditional values with national development, in a similar way as African governments did in the past.³⁶⁸ Unlike African countries, however, they can put forward their economic success as an evidence of the validity of the liberty trade-off thesis. Nevertheless, this approach to development is misleading as it is based on a restricted notion of development, which fails to deal with the connection between human rights and development. Moreover, even its strict definition is empirically questionable. As it shall be argued below, the suppression of civil and political rights is not necessary for development, and furthermore, civil and political rights can actually contribute to development.

6.2.1 Defining Development

The concept of development itself is controversial³⁶⁹ and many different definitions exist. The liberty trade-off thesis is usually used in relation to a narrow concept of development which corresponds with economic growth, expressed by gross national product (GNP). This definition does not take into account either the distribution of wealth or the extent to which economic and social rights are guaranteed.

A broader notion which also takes these aspects of development in account has emerged since the late 1960s, when the International Labour Organisation's World Employment Programme argued that an equitable participation in economic development should be guaranteed by employment policies. Furthermore, the elaboration of the concept of "human development" by the UNDP has contributed significantly to the articulation of development beyond the narrow focus of economic growth. Human development indicates both "a process of enlarging people's choices",³⁷⁰ by expanding human capabilities - i.e. the range of things which a person can do and be in leading a life - and the level of well-being. From this perspective, income is only one aspect and not a goal of development. For this reason, human development is not estimated in terms of GNP, but instead by assessing longevity, knowledge and a decent standard of living,³⁷¹ which signifies human capabilities.

³⁶⁸ See F. Zakaria, "Culture is Destiny: A Conversation with Lee Kuan Yew", 73 *Foreign Affairs*, 1994, pp. 109-126. Lee Kuan Yew is a former Prime Minister of Singapore.

³⁶⁹ For a survey on the concept of development and the evolution of the perspectives on its relationship with human rights, see J. Donnelly "Human Rights, Democracy, and Development", in 21 *Human Rights Quarterly*, 1999, pp. 622-628.

³⁷⁰ UNDP, *Human Development Report*, 1998, p. 14.

³⁷¹ The measurement of human development is effected through a human development index (HDI) expressed in

Therefore, this definition of development not only encompasses economic growth but also the enjoyment of economic and social rights.³⁷² In fact, the concept of human capabilities adopted in the human development definition corresponds, in fact, to the substance of these rights.

The winner of the 1998 Nobel Prize in Economic Science, Amartya Sen, has been a central figure in the reformulation of the understanding of development. He created the concept of human capabilities adopted by the UNDP,³⁷³ and referred to development as freedom or as the process of expanding the real freedoms that people enjoy, which correspond with the capabilities of persons to lead the type of lives which they have reason to value. In this understanding of development, social and economic rights as well as political and civil liberties are not only conducive to development but are also an integral part of it.³⁷⁴ Within this definition, economic growth is only one means to achieve development along with others, such as education and health services and the liberty to freely express one's opinion.

6.2.2 The Liberty Trade-Off: Compatible With but Not Necessary for Development

A survey of the post-independence history of sub-Saharan Africa reveals the inadequacy of the trade-off argument. In the 1960s, sub-Saharan African GNP per capita grew at a rate of 1.3 percent, whilst in the 1970s it had decreased reaching a rate of 0.8 percent, and in the 1980s several countries had negative rates.³⁷⁵ The experiences of other regions of the world seem, however, to confirm this thesis. Countries such as South Korea, Singapore, Taiwan and, more recently, China- where civil and political liberties are constrained to different degrees- have remarkable performances of economic growth. This empirical observation cannot, however, be considered to be a sufficient evidence of the value of the liberty trade-off theory as other cases can be cited which prove exactly the opposite and, in this regard, sub-Saharan Africa is exemplary. Botswana, one of the few African states which have been democratic since independence, has had the most constant and equitable economic growth in the region and one of the fastest rates of growth in the world. This shows how it is not possible to build a theory simply on the basis of a statistical observation of the coexistence of a certain political regime with economic growth. A mere statistical approach, which is not supported by a causal

indicators of the three above-mentioned main and quantifiable components of the concept. The indicators are life expectancy, educational attainment and adjusted income per capita.

³⁷² This is expressly recognised also by the UNDP, see *Human Development Report*, 1992, p. 29 where it is stated that "[t]he human development index is an attempt to measure economic and social rights and the extent to which they are realized".

³⁷³ See A. Sen, *Resources, Values and Development*, Basil Blackwell, Oxford, 1984, p. 317.

³⁷⁴ A. Sen, *Development as Freedom*, Alfred A. Knopf, New York, 1999.

³⁷⁵ Howard, *Human Rights in Commonwealth*, cit., p. 60.

analysis, could be used to validate both a liberty trade-off and a human rights approach to development. Furthermore, when studies of the factors which have determined good economic performances in authoritarian states have been carried out, a range of factors which are not incompatible with political systems which respect civil and political rights have always been singled out.³⁷⁶ Therefore, the only possible interpretation of successful economic growth in authoritarian states is that the repression of civil and political liberties is *compatible* with economic growth but not *necessary* for its achievement.

However, even compatibility is questionable when one considers economic security as a further indicator of development. In this regard, Amartya Sen has demonstrated through empirical studies that famines have historically occurred in countries which did not suffer from any scarcity of food and were even able to fulfil economic and social rights.³⁷⁷ The absence of democracy was a common feature of these states. In fact, he has shown that no famine has ever taken place in democratic states where freedom of the press was respected. The electoral costs and the public outcry provoked by such a catastrophe are too high a price to pay for any government.

6.2.3 The Constructive and Instrumental Role of Civil and Political Rights

Not only is there no convincing evidence that an authoritarian state can achieve an easier or faster economic growth than a state in which civil and political rights are guaranteed, but it is also arguable that the absence of civil and political rights may hamper development or, conversely, that civil and political rights can play a positive role in development,³⁷⁸ including both economic growth and human development. Indeed, this is the conclusion which can be drawn from the sub-Saharan African experience. This contention is confirmed not only by a statistical survey but also through an analysis of the interrelation of cause and effect between the existence of underdevelopment and the constraints on civil and political rights.

³⁷⁶ With reference to Southeast Asia, see A. Sen, "Freedoms and Needs", 31 *The New Republic*, 10 and 17 Jan. 1994, p. 32.

³⁷⁷ This was the case of China in 1958-61 when a famine provoked the deaths of millions of people. Moreover, in Africa the famine of 1983-84 was more severe in countries which were relatively less affected by drought. Countries such as Botswana, Zimbabwe and to a lesser extent Kenya and Capo Verde were able to avoid the large-scale famines of Ethiopia and Sudan. The main reason for the different results was due to the nature of their respective political systems, which especially in the case of Botswana and Zimbabwe were relatively open and pluralist; see A. Sen and J. Drèze, *Hunger and Public Action*, Clarendon Press, Oxford, 1989, p. 71.

³⁷⁸ See A. Sen, "Human Rights and Economic Achievement", in J.R. Bauer and D.A. Bell, *The East Asian Challenge for Human Rights*, Cambridge University Press, Cambridge, 1999, pp. 88-102; Human Rights Watch, *Indivisible Human Rights: The Relationship of Political and Civil Rights to Survival, Subsistence and Poverty*, 1992; Donnelly, *Human Rights and Development*, cit.; Howard, *The Full-Belly Thesis*, cit.; R.E. Goodin, "The Development Trade-Off: Some Unwarranted Economic and Political Assumption", in 1 *Universal Human Rights*, 1979, pp. 31-42; H.S. Park, "Human Rights and Modernization: A Dialectical Relationship?", 2 *Universal Human Rights*, 1980, pp. 91.

The pursuit of ineffective economic policies, which in addition only benefited a small élite, was possible due to the absence of accountability mechanisms such as free elections and open criticism, which are possible only if the right to speech, press, association and assembly can be freely exercised. This does not deny that other external factors may have contributed to African underdevelopment, as the advocates of the 'dependence theory' have emphasised. However, an interpretation of the causes of underdevelopment in sub-Saharan Africa cannot be considered as complete if internal reasons are ignored.³⁷⁹ Among these, the limits imposed on the exercise of human rights had a substantial weight. Indeed, human rights can play what Amartya Sen has called an "instrumental" role,³⁸⁰ in other words, they act as an incentive for the adoption of adequate development policies, also in strict macroeconomic terms. The risk for the government of not being re-elected and the internal criticism from opposition parties or the media represents a powerful guarantee against economically inadequate policies. This is particularly true if they only privilege a small portion of the population and their costs have to be paid by the remaining majority, as occurred, for example, with the agricultural measures imposed in Zambia in the name of modernisation. These measures only provided advantages to a minority and marginalized the rural population, whose traditional cultivation was replaced by the forced cultivation of maize. In addition, in the long term, they resulted in being harmful both from a macroeconomic and environmental standpoint.³⁸¹

Apart from the instrumental perspective, civil and political rights can also play what Amartya Sen has called a "constructive" role, which rests on their intrinsic value. The constructive role consists in the promotion of public discussion, which is conducive to a knowledgeable elaboration of needs and values. However, this role has been disregarded because of the implicit premise of the trade-off argument that development policies are only matter of technical decisions. However, this premise is erroneous as, in reality, development policies are the subject of the political evaluation of values, needs and priorities. Hence, there is not unique pattern of development, which can be established by politically neutral appraisals, but instead, there are many different models of development. For example, human and sustainable development which takes into account both the impact on the environment and future generations' needs,³⁸² requires a knowledge of public concerns and, therefore,

³⁷⁹ See Howard, Commonwealth, cit., pp. 68-78.

³⁸⁰ Sen, Human Rights and Economic Achievement, cit., pp. 90-96.

³⁸¹ See in J.-P. Raison, "De l'or rouge à l'or vert? Dualisme économique, Etat-providence et virage libéral: les mutations des politiques agricoles en Zambie", in J.-P. Daloz et J.D. Chileshe, *La Zambie contemporaine*, Ed. Karthala, Paris, pp. 165-176.

³⁸² See United Nations Conference on Environment and Development, *Agenda 21: Programme of Action for Sustainable Development*, 1992.

implies that these can be freely expressed. This model of development does not necessarily require a high GNP. However, it can put a virtuous cycle in motion for an increase in economic growth which can, in turn, contribute to a further improvement of human development.³⁸³ In this regard, education plays a basic role. Firstly, it improves and enlarges the skills on which a country can rely, which leads to both a quantitative and a qualitative enhancement of productivity, a more rational selection and use of the technology imported and the development of domestic science and technology. Furthermore, the presence of people with a higher level of education reinforces legal, political and financial institutions of the country in question. This not only improves the quality of development strategies that these institutions are called upon to formulate but also contributes to strengthening the state structure and, consequently, the state ability for self-determination, which is at the centre of the African political and human rights concerns.

A human development pattern in which the existing resources are used for the fulfilment of economic and social rights also has a fundamental advantage in terms of another major African concern, namely political stability. This model of development reduces the risk that popular discontent for the low standard of living would lead to opposition against the state. Sub-Saharan Africa is an example of how stability may be undermined by such dissatisfaction, which can also be easily manipulated. African governments were aware that stability also depended upon development, however, in this regard, they interpreted development in merely macro-economic terms, considering it as a condition of the state. Thus, they overlooked the link between stability and individual (social and economic) development.

However, the constructive role of civil and political rights can be appreciated not only with reference to the human sustainable model of development, but also in considering the mere technical aspect of development programmes. A broad range of information is necessary and this can be obtained only if the freedoms of speech, press, association and assembly as well as free elections are guaranteed.

Furthermore, from the perspective of African governments' theoretical approach to human rights, it is arguable that popular participation is consistent not only with an African interpretation of development linked to economic and social rights, but also to an African definition of the right to self-determination, which is at the core of the regional human rights discourse. Indeed, public participation can be seen in terms of the exercise not only of

³⁸³ See G. Ranis, F. Stewart, A. Ramirez, "Economic Growth and Human Development", in 28 *World Development* 2000, pp. 197-219. Starting from the assumption that the ultimate objective is human development and that economic growth is a means to achieve it, they have empirically assessed that economic growth itself can only be sustained if it is preceded or accompanied by an enhancement of human development.

individual civil and political rights, but also of the collective right to self-determination, which according to the African Charter implies that peoples "shall pursue their economic and social development according to the policy they have freely chosen".³⁸⁴ In this way, the liberty trade-off argument seems to contradict the African approach to development, not only in the way that it is interpreted, but also in the way that it should be pursued. In fact, the definition of self-determination which is included in the African Charter also referred to development and implicitly embraces political and civil freedoms, unless the term 'peoples' is interpreted to signify the government.

An additional aspect to consider when dealing with development concerns the issue of the effectiveness of the relevant policies. In this regard, it should not be overlooked that their implementation largely depends on the citizens' support. However, this support can only be obtained as far as these policies take into account people's opinions and needs, which can only be discerned if the freedom of speech, press and association are protected. In fact, the failure of the policies of sub-Saharan African states was often due to the neglect of the citizens' views. The repression of civil and political liberties has not only determined the ineffectiveness of development measures,³⁸⁵ but it has often proved costly in terms of long-run economic development. For example, preventing peasants from demanding an increase in the prices of their produce has often resulted in an expansion of the black market or an enhancement of smuggling.³⁸⁶ Moreover, the high cost of the popular sense of alienation from government policies can be seen in the success of demagogical politics and frequent coups d'état, as the history of sub-Saharan Africa clearly shows.

A further role that civil and political rights can play with reference to development consists in creating an environment in which the more educated are generally willing to stay and work. Authoritarian states induce the highly educated to leave their countries, thus depriving the nation of the expertise needed for development. Moreover, a development policy which does not invest resources for the use of the people with higher education may even produce more serious consequences. The discontent of the intellectual élite in illiberal contexts may lead to undemocratic forms of expression and contribute to political instability, as in the case of Benin.³⁸⁷ Therefore, the combination of civil and political rights with

³⁸⁴ Article 20(1).

³⁸⁵ This was the case of 'villagization' programs in Tanzania in 1973-75. Peasants, forced to leave their villages, refused to cultivate the lands where they were re-settled. This provoked a dramatic decrease of the maize production and the need for Tanzania to become an importer of food.

³⁸⁶ Howard, Full-Belly, cit., p. 471-72.

³⁸⁷ E. Hodginson, in P. Englebert, "Benin", in *Africa South of the Sahara*, Europa Publications, London, 2000, p. 189.

investment in social and economic rights is a fundamental condition for the training and use of the experts needed for development.

In conclusion, the contention that there is a positive link between development and civil and political rights does not ignore that there are some democracies which have consistent records of economic growth with unsatisfactory levels of human development. High per capita incomes may, indeed, be counterbalanced by an unequal distribution of wealth and a scarcity of public services. This does not, however, question the importance of civil and political liberties but it certainly does pose a challenge for democratic states to enhance political participation of their citizens and to give greater consideration to their needs and concerns.

CHAPTER 7: Why Has the Liberal Model of Human Rights Found Obstacles in Sub-Saharan Africa?

Despite the differences among the various experiences of sub-Saharan African countries, the study of Zambia and Benin's modern constitutional histories has shown that the liberal model of human rights has met serious obstacles in sub-Saharan Africa and these problems were not only of an ideological nature as described in the previous chapter. This chapter will attempt to clarify the nature of these obstacles in the light of the scholarship on the theory of legal transplant. This will also have the preliminary function of providing the analytical tools to interpret the dynamics that the liberal model of human rights provoked in the region.

7.1 The Theories of Legal Transplants

From the perspective of the present study, there are two fundamental questions concerning legal transplants, namely, why they occur and what is their effect? Correlative to the latter question is the issue of the reasons underlying the outcome of the transplants. As far as the first question is concerned, Alan Watson, who has written extensively on the subject, has argued that "law develops by transplanting"³⁸⁸ and from his studies on the spread of private Roman law in continental Europe he has concluded that there are two reasons for the widespread recourse to legal transplanting. The first centres on the fact that the legal profession enjoys a high degree of autonomy, which allows it to operate without responding to external pressures of a social, political or economic nature. As he has stated,

"to a large extent, law possesses a life and vitality of its own; that is, no extremely close, natural or inevitable relationship exists between law, legal structures, institutions and rules on the one hand and the needs and desires and political economy of the ruling élite or of the members of the particular society on the other hand. If there was such a close relationship, legal rules, institutions and structures would transplant only with great difficulty, and their power of survival would be severely limited".³⁸⁹

The second reason lies in the fact that the legal profession has traditionally developed its argumentation on authority and precedent and therefore it prefers to refer to and borrow from

³⁸⁸ A. Watson, "Comparative Law and Legal Change", in 37 *Cambridge Law Journal*, 1978, p. 315; on Watson's position see also *Legal Transplants: An Approach to Comparative Law*, 2nd edition, University of Georgia Press, Athens, 1993; "Legal Change, Sources of Law and Legal Culture", in 131 *University of Pennsylvania Law Review*, 1983, pp. 1121-1157; "Legal Transplants and Law Reform", in 92 *The Law Quarterly Review*, 1976, pp. 79-84.

³⁸⁹ Watson, *Comparative Law*, cit., pp. 314-315.

institutions which already exist in foreign legal systems. Therefore, legal change and law are generally not the expression of societal needs.³⁹⁰

As far as the choice of the model is concerned, Watson has argued that this depends largely "on matters such as linguistic tradition shared with a possible donor, the *general* prestige and accessibility of the possible donor, the training and experiences of the local lawyers".³⁹¹ Furthermore, Rodolfo Sacco has elaborated on this point by highlighting imposing and prestige as the two main determinants in the selection of a model.³⁹² Sacco has explained that "[u]sually reception takes place because of the desire to appropriate the work of others. The desire arises because this work has a quality one can only describe as "prestige".³⁹³ Therefore, transplants may occur without considering the socio-economic, political or cultural features of the recipient system. The crucial question is whether this affects the success of legal transplants. In this regard, there are two extreme and opposing schools of thought, which correspond to an autonomist and a contextualist perspective of law.

The most well known exponent of the former view is Watson. He has argued that legal transplants are easy to perform even among societies with different socio-economic structures as "legal rules may be very successfully borrowed where the relevant social, economic, geographical and political circumstances of the recipient are very different from those of the donor system".³⁹⁴

The first contextualist response to Watson's approach was formulated by Kahn Freund, who drew from Montesquieu's theory that "*les lois politiques et civiles de chaque nation ... doivent être tellement propre au peuple pour lequel sont faites, que c'est un grand hasard si celles d'une nation peuvent convenir à une autre*".³⁹⁵ Montesquieu found that the possibility for transferring private or public was extremely difficult ("*un grand hazard*") because of a series of factors which determined the "*esprit des lois*" and which could be political, such as the nature of the government, and also environmental. The environmental factors can be geographical (such as size and geographical position of a country, climate,

³⁹⁰ However, in other writings Watson has refined this 'insulation thesis' by admitting that "law does reflect ... people's desires and needs... And who would deny that much of law reflects the interests of the ruling élite?", see A. Watson, *Society and Legal Change*, Scottish Academic Press, Edinburgh, 1977, p. 4. On the "weak" and "strong" versions of Watson's insulation theory, see W. Ewald, "Comparative Jurisprudence (II): The Logic of Legal Transplants", in 43 *American Journal of Comparative Law*, 1995, pp. 489-510.

³⁹¹ Watson, *Comparative Law*, cit., p. 327.

³⁹² Sacco, *Introduzione al diritto comparato*, UTET, Torino, p. 148.

³⁹³ Sacco, "Legal Formants: a Dynamic Approach to Comparative Law", in 39 *The American Journal of Comparative Law*, 1991, p. 398.

³⁹⁴ Watson, *Legal Transplants and Law Reform*, cit., p. 80. More recently, Watson has conceded that transplants may undergo change and adaptation determined by a particular context, see A. Watson, *Legal Transplants and European Private Law*, Ius Commune Lecture, Maastricht, Metro 2000.

³⁹⁵ Montesquieu, *Esprit de Lois*, Book I, Chap. 3 (Des lois positives).

fertility of the soil), social and economic (such as occupation, density, wealth of the population, trade) or cultural, such as religion, traditions and customs. By developing upon Montesquieu's theorisation, Kahn-Freund distinguished two types of legal transfers, which he has defined as 'mechanical' and 'organic'. The former can be compared with the insertion of a part of a machine into another machine and include the transfer of legal institutions which are not deeply embedded into the culture of the donor society and for this reason they are easy to perform. The latter can be compared to the transplant of an organ of a human body and involve the transfer of institutions which are profoundly embedded in a society and its culture and are often difficult to perform and can fail, as it is in the case of organic transplants. According to Kahn-Freund, therefore, the degrees of transferability of legal institutions are variable and depend on the strength of the link between law and society. Consequently, he has cautioned us that, "we cannot take for granted that rules or institutions are transplantable... any attempt to use a pattern of law outside the environment of its origin continues to entail the risk of rejection".³⁹⁶

According to this author the geographical, economic and social, and cultural factors indicated by Montesquieu among the elements conditioning the viability of legal transfers have lost their importance to a great extent due to the occurrence of a process of economic, social and cultural assimilation or integration among developed countries and the dominant classes in the developing world. Conversely, the political factor, signifying the link between law and the power structures of a given society, has become more relevant. However, Kahn-Freund has recognised that Montesquieu's list of environmental factors has not entirely lost its validity, in particular "in the relations between the so-called developed and the so-called developing nations or countries"³⁹⁷ given the fact that the economic, social and cultural integration is less evident in certain parts of the globe, including in Africa.

Kahn-Freund's emphasis on the political factor was strongly affected by the international political situation of the 1970s, however, it contains elements which are still valid and provide a tool for interpreting the contemporary dynamics provoked by legal transplants. Apart from highlighting the political differences which existed between the communist and non-communist world, as well as the dictatorships and democracies in the capitalist world and those between the presidential and the parliamentary forms of government, he has singled out another political difference, which is represented by "the enormously increased role which is played by organised interests in the making and in the

³⁹⁶ O. Kahn-Freund, "On Uses and Misuses of Comparative Law", in 37 *The Modern Law Review*, 1974, p. 27.

³⁹⁷ *Ibidem*, p. 8.

maintenance of legal institutions".³⁹⁸ He has clarified that organised groups not only relate to groups representing economic interests such as big business, agriculture, trade unions, consumer organisations, but also organised groups concerning cultural, religious and charitable interests, among others. All of these share in the political power and possess a certain degree of influence. For this reason, in order to evaluate the potential success of legal transplants it is necessary to address the strength of the link between the transferred institution and the power structure of the donor system, as expressed not only in the formal constitution, but also by the social groups which, as Kahn-Freund highlights, play a decisive role in the law-making and decision-making processes of democratic countries.

The final point which will be made regarding Kahn-Freund's contextualist approach concerns his belief that the knowledge of the transplanted law and its context is necessary in order for it to be successfully entrenched in a new environment. In this regard, he referred to the import of the British form of parliamentary government to Africa as an example of how a transplant can fail as the recipient countries did not share the same history, social structure and political consensus of the donor country. Therefore, the use of comparative law, and the recourse to transplants, "requires a knowledge not only of the foreign law, but also of its social, and above all its political context",³⁹⁹ otherwise it risks turning into an "abuse".

A more sceptical view of the feasibility of legal transplants is expressed from a culturalist perspective by Legrand, who argued that "transplants are impossible". He objected to Watson's approach as it neglects the epistemological dimension of the legal rule and contended that rules are the expression and bear the imprint of specific cultures.⁴⁰⁰ In essence, Legrand stresses that "[l]egal systems are but the surface manifestation of legal culture and, indeed, of culture *tout court*".⁴⁰¹ Therefore, it is possible to transplant the rule as a 'propositional statement', but not its meaning, as the latter is culturally determined. A society which borrows a legal rule interprets the propositional statement incorporated in it and gives it a meaning which is different from the original one. The result is that "a crucial element of the ruleness of the rule -its meaning- does not survive the journey from one legal system to another"⁴⁰² and at the end of the journey, a different rule is created. Consequently, even when

³⁹⁸ Ibidem, p. 12.

³⁹⁹ Ibidem, p. 27.

⁴⁰⁰ P. Legrand "The Impossibility of 'Legal Transplants'", in 4 *Maastricht Journal of European and Comparative Law*, 1997, pp. 111-124. See also P. Legrand, "What 'Legal Transplants'?", in D. Nelken and J. Feest, *Adapting Legal Cultures*, Hart Publishing, Oxford, 2001, pp. 55-70.

⁴⁰¹ P. Legrand, "European Legal Systems are not Converging", in 45 *The International and Comparative Law Quarterly*, 1996, p. 55.

⁴⁰² Legrand, *The Impossibility*, cit., p. 117.

legal systems contain same rules, as far as phraseology is concerned, they remain different as their respective culture and "legal *mentalités*", (i.e. the cognitive structure of a legal culture), are not the same.

A reformulation of the debate on legal transplants, which tries to overcome the dichotomy between context and autonomy, has been advanced by Teubner. He has recognised the validity of Watson's thesis regarding the role of the legal profession but he finds that this observation is only justified in the sense that the inner logics of the legal discourse tend to draw solutions from the global legal system rather than inventing new ones. However, this does not exclude that fact that legal transplants are a reaction to external stimuli emanating from culture and society. Moreover, it could also be argued that Watson neglects the contribution which may be played by non-legal actors of a domestic or international nature.

In addition, Teubner acknowledges the value of Watson's contribution, which consists in demonstrating that legal change does not necessarily mirror social changes. Nevertheless, Teubner does not agree with Watson's claim that the autonomy of law from society is a general pattern. This claim is based on the specific experience of the spread of Roman private law in continental Europe. In this respect, prior to Teubner, Ewald pointed out how Watson's insulation theory cannot be applied to European public law or to non-Western cultures given its limited empirical foundation. Moreover, Ewald acknowledged that Watson's critique of the "law-mirror-society" approach is valid when it affirms that "law does not reduce to economics (or politics or philosophy or society)" and therefore does not necessarily reflect social needs and evolution, but it is not valid when it implies that "law is entirely unrelated to these subjects".⁴⁰³ According to Ewald, Watson's challenge to the "law-mirror-society" perspective should be interpreted as a suggestion that in looking at the links between law and society, one should be aware of the complexity of their relationship and that "whatever they turn out to be, they are unlikely to be straightforward; indeed it is reasonable to expect that the causal relationships between law and society will prove to be reciprocal, interactive, and multi-layered".⁴⁰⁴

Teubner primarily highlights the failure of the proponents of the contextualist approach to capture the complexity of the relationship between law and society. Thus he questions the fact that Legrand recognises the pluralism of cultures but ignores the fragmentation of discourses existing within cultures, which has been described in post-

⁴⁰³ See Ewald, *Comparative Jurisprudence II*, cit., p. 508 and "The American Revolution and the Evolution of Law", in 42 *The American Journal of Comparative Law* (supplement volume), 1994.

⁴⁰⁴ Ewald, *Comparative Jurisprudence*, cit., p. 509.

modernist scholarship.⁴⁰⁵ As Teubner underlines, law is not tied to society as a whole, but rather to different social worlds or sub-systems within society. Moreover, law cannot be considered any longer as an expression of a nation's own culture and unique cultural experience. "Rather, national laws - similar to national economies - have become separated from their original comprehensive embeddedness in the culture of a nation". Therefore, in Teubner's view, this means that contemporary legal transfers should be seen as "a direct contact between legal orders within one global discourse". However, Teubner does not go as far as to say that the ties between a nation's culture and law have ceased to exist, and he admits that "in spite of all differentiation and all autonomy of law we should not lose sight of the cultural ties of the laws and closely observe what happens to them when laws are decoupled from their national roots".⁴⁰⁶ Furthermore, in line with Ewald,⁴⁰⁷ Teubner argues that even where law and society are only loosely tied, legal transfers are not easy to realise, in contrast with Kahn-Freund's reference to 'mechanic' transfers. In addition, Ewald has emphasised that "legal institutions cannot easily be transferred from one context to other like the 'transfer' of a part from one machine to another. They need careful implantation and cultivation in the environment".⁴⁰⁸ Nevertheless, Teubner finds that the dichotomy between "repulsion" and "interaction" formulated by the scholarship on legal transplants is flawed and this notion is based on the misleading metaphor of legal transplants.⁴⁰⁹ The core of his thesis is based on the idea that

"... 'transplant' creates the wrong impression that after a difficult surgical operation the transferred material will remain identical with itself laying its old role in the new organism. Accordingly, it comes down to the narrow alternative: repulsion or integration. However, when a foreign rule is imposed on domestic culture, I submit, something else is happening. It is not transplanted into another organism, rather it works as a fundamental irritation which triggers a whole series of new and unexpected events... They will unleash an evolutionary dynamic in which the external rule's meaning will be reconstructed and the internal context will undergo fundamental change".⁴¹⁰

⁴⁰⁵ G. Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences", in 61 *The Modern Law Review*, 1998, p. 15.

⁴⁰⁶ *Ibidem*, pp. 15-16.

⁴⁰⁷ W. Ewald, "Comparative Jurisprudence I: What Was It Like to Try a Rat", in 143 *University of Pennsylvania Law Review*, 1986.

⁴⁰⁸ *Ibidem*, p. 8.

⁴⁰⁹ Teubner, *Legal Irritants*, cit., p. 12.

⁴¹⁰ *Ibidem*, p. 8. The inadequacy of the metaphor of legal transplants to represent the complexity of the effects which may ensue from legal transfers has also been highlighted by Feldman in his study on rights and Japanese

In this respect, Teubner has provided a convincing framework to interpret the dynamics set in motion by the legal transfers. This framework is built on the idea that law and the social discourse are tied in a 'binding arrangement',⁴¹¹ develop along to different paths, however the evolutionary processes which they follow interact and lead to further changes. Consequently, legal transfers "irritate" these "co-evolutionary processes of separate trajectories". On the legal side of the binding arrangement, the transferred rule is placed in the new legal context and, while maintaining its identity, it undergoes a legal reinterpretation. On the social side, if the transferred rule is recognised, it is re-conceptualised according to the language of the receiving social system and provokes changes. In turn, these changes act as irritants of the legal side of the binding institution "thus creating a circular co-evolutionary dynamic that comes to a preliminary equilibrium only once both the legal and the social discourse will have evolved relatively stable eigenvalues in their respective sphere".⁴¹² According to Teubner, there are three possible outcomes of the legal transfer, i.e. the imported legal institution can be completely rejected; it can destroy the binding arrangement; or it can trigger the dynamic described above, thus producing a change in its own identity.

Teubner has drawn attention to the pluralistic fragmentation of the social 'side' of the two parts involved in legal transfers and Rodolfo Sacco has shown that also the legal 'side' is complex. The phenomenon of legal transfers does not regard law as a unitary entity, but instead as an entity composed of different "legal formants", which include statutory rules, scholarly formulations and decisions of judges.⁴¹³ In addition to the legislative, judicial and scholarly models, legal formants may also be non legal statements, such as propositions about philosophy, politics, ideology or religion. Legal transplanting can affect each formant autonomously as legal formants can borrow from different models, which are usually (but not

legal culture. He has underscored how unlike legal transfers, the transplants of organs imply the removal and substitution of an organ. In the case of legal transfers there is no replacement but rather an addition. For this reason, he finds the metaphor of grafts more accurate than that of transplants. "Grafting, the process of fusing the lives of two different living organisms or the covering of one by the other, better captures many aspects of the exchange". The metaphor of grafting suggests that legal transfers involve a contact between the imported institutions and existing ones. Moreover, it reveals that the effects of legal exchange are more complex than the alternative rejection/entrenchment of the transferred institution; see E.A. Feldman, "Patients' Rights, Citizens Movements and Japanese Legal Culture", in D. Nelken, *Comparing Legal Cultures*, Aldershot, Dartmouth, 1996, p. 220. For different views on the issue of legal transplants, see also Nelken and Feest, cit.

⁴¹¹ On the concept of law's binding arrangement see G. Teubner, "The Two Faces of Janus: Rethinking Legal Pluralism", in 13 *Cardozo Law Review*, 1992, pp. 1443-1462.

⁴¹² Teubner, *Legal Irritants*, cit., p. 27. The theory of legal irritants is linked to the theory of autopoiesis, which sees the relation between unofficial and official legal discourses and between them and other social discourses not as causally influencing each other, but rather as using each other "as *chocs exogènes*, i.e. as perturbations to build up their own internal structures", see Teubner, *The Two Faces*, cit., p. 1453.

⁴¹³ Sacco, *Legal Formants*, cit., pp. 1-34.

necessarily) homologous, and consequently, the various formants may not be in harmony with one another.

7.2 Has the Liberal Model of Human Rights Failed in Sub-Saharan Africa?

The analysis of Zambia and Benin has shown that, contrary to Watson's assertions, legal transfers are not easy to realise. In this regard, terms such as 'failure' or 'rejection' have often been employed to describe the outcome of liberal constitutionalism in sub-Saharan Africa by constitutional lawyers as well as scholars using the metaphor of legal transplants or, in the case of French scholarship, the concept of '*mimétisme*'. However, the notion of an outright failure or rejection is unsatisfactory as it gives a uniform and static picture of the import of the liberal pattern of human rights in the region. The theory of 'legal irritants' formulated by Teubner shows that legal transfers provoke processes which do not produce a simple outcome, instead, they set a complex dynamic in motion, between the different discourses within the recipient societies, and the dynamics of these different discourses do not necessarily converge. Moreover, this process may produce divergences even within the legal discourse, between what Sacco has defined as legal formants.

Thus by adopting this approach, the import of the liberal model of human rights in the sub-Saharan African region can be seen as "irritating" African societies and legal systems and, consequently, as triggering off different dynamics. The effects of the transfer can only be understood by analysing the impact of this model on the various discourses within African societies and on the various legal formants of the legal system.

As far as the legal discourse is concerned, we have seen that although the liberal bill of rights was formally retained in Zambia, it was largely ineffective due to the introduction of unipartism. However, the bill of rights did not simply have a symbolic value, as it allowed the judiciary to play a role in the enforcement of the rights and freedoms still protected by the constitution. The judiciary, albeit not constantly, demonstrated a willingness to give priority to individual rights over the public interest of national unity in opposition to the ideological discourse of the time. Therefore liberal values continued to have an impact on the judicial formant of the legal discourse.

The situation in Benin was different. In this case, the dynamic prompted by the transfer of the liberal human rights ideal led to an outright rejection on ideological grounds which was represented by the Marxist-Leninist shift. Moreover, unlike the case of Zambia,

the judiciary lacked not only institutional autonomy but also ideological independence.⁴¹⁴ However, the legal profession retained its critical stance and was engaged in a reflection on the existing legal structures and on the future of Beninese constitutionalism since the 1980s.⁴¹⁵

As far as civil society is concerned, the impact of this transfer was scarcely visible and this turns out from the low level of human rights awareness manifested by the limited popular participation in the consultation phases of the constitution-making processes, the reduced number of human rights cases and the fact that political opposition was not based on a human rights discourse either in Zambia or Benin.⁴¹⁶ However, a distinction should be made on the basis of the fundamental social differences in African society, i.e. the gap between rural and urban populations. The rural segments of African society remained outside the sphere of influence of liberal ideas for historical reasons (such as the illiberal and non-democratic experience of colonialism) and structural factors (such as geographical isolation, illiteracy and lack of knowledge of the official language of the law, which was introduced by the colonial power). The significance of this exclusion is huge considering that rural and illiterate population constituted the great majority of African societies. For example, in the 1960s, 80 per cent of the population of Benin lived in rural areas and 92 percent were illiterate. However, the fact that the rural masses did not have a human rights consciousness or any familiarity with the idea of liberal constitutionalism does not mean that they willingly accepted the authoritarian systems. They often reacted through passive resistance. For example, these tactics led to the failure of the programme of '*champs collectifs*' established by the government of Maga in Benin in 1961-63,⁴¹⁷ which reminded them of the corvées and the forced labour imposed by the French. This attitude should be highlighted as it shows that the so much emphasised African sense of duty and solidarity, which Maga's programme was supposed to stimulate, was context-specific. The collective effort required by the modern state was not felt to be legitimate, while it would have been felt so if it had been asked within the traditional socio-political structures. As it has been argued in the previous chapter, African societies found themselves in a complex situation in the post-decolonisation period,

⁴¹⁴ See for example the justification of the 1977 Constitution by the *Président de chambre* of the Cour Suprême; see A. Paraiso, *La loi fondamentale*, cit.

⁴¹⁵ For example, The *Revue Béninoise des sciences juridique et administratives* provided space for doctrinal reflections on constitutionalism.

⁴¹⁶ On political opposition in Zambia see M. Bratton, "Zambia Starts Over", in 3 *Journal of Democracy*, 1992, pp. 84-85 and M.B. Ndulo and R. Kent, "Constitutionalism in Zambia: Past, Present and Future", in 40 *Journal of African Law*, p. 268. On Benin, see R. Banégas, "Mobilisations sociales et oppositions sous Kérékou", in 59 *Politique africaine*, 1995, pp. 25-44.

⁴¹⁷ Glelé, *Naissance d'un état noir*, cit. p. 311.

where the legal, social, political, economic and cultural spheres were influenced by many different sources. On the one hand, the liberal conception of the relationship between the individual and community, based on the idea of rights that the former can enforce against the latter, did not have any impact on the mindset of the rural masses. On the other hand, the import of the Western-modelled nation-state eroded the traditional understanding of this relationship. Recognising the ineffectiveness of the introduction of the liberal conception of rights without acknowledging the erosion of the traditional understanding of the relationship between the individual and the community, gives a flawed portrayal of post-colonial Africa and the extent to which it was ready to accept the liberal idea of human rights, at least in regard to the public sphere. In this way, the transfer of the liberal model of human rights cannot be separated from the introduction of the modern state political organisation into post-colonial sub-Saharan Africa.

Unlike the rural populations, the urban and educated components of African society mobilised to defend their interests and to react to the abuses of the government in various ways throughout the region. Trade unionism in both Zambia and Benin and opposition against the military dictatorship of Kérékou are evidence of this. This mobilisation was a manifestation of the discontent within the existing regimes, but was not *per se* a sign of support for liberal constitutionalism. Nevertheless, it should be remembered that the existence of a bill of rights in Zambia drew the support of a small portion of society. During the popular consultation process preceding the adoption of the single party constitution, a stronger protection for the rights of citizens under preventive detention was one of the most pressing issues of concern. Moreover, the subsequent restrictive amendments to the provisions of the bill of rights concerning the rights of detainees and restrictees were strongly opposed by individual citizens, civil society organisations and MPs. The extent to which the freedom of association was valued was evident from the reactions provoked by the decision of the government to introduce unipartism. It is interesting to note that unipartism was not only questioned by three-quarters of Zambians who participated in the consultation process, but it was also challenged through judicial recourse. The above reactions indicate that although it incorrect to speak of a general liberal political and legal culture during this phase of Zambian constitutional history, it should not be overlooked that a section of Zambian society felt protected by the bill of rights and was ready to use it not only as a rhetorical instrument of political struggle but also as a legal tool.

Finally, it is important to note that the most widespread resistances to liberal principles were encountered in the private sphere. In Zambia, like in the other former British

colonies' constitutions, a derogation to the principle of non-discrimination was permitted in the private sphere and this exception was confirmed by the exemption of customary law from the scope of application of this principle. This provision was also retained after the constitutional revision following the introduction of unipartism. Moreover, even in countries where the principle of equality was constitutionally recognised without exemptions, discrimination, and in particular sex-based discrimination, was a common feature of the private sphere given the force of customary and religious law and practices. Despite its reference to the socialist model, even the 1977 Beninese Constitution, implicitly allowed for exceptions of the principle of gender equality.

7.3 Explaining the Obstacles to the Liberal Human Rights Model in Sub-Saharan Africa.

The following issue which needs to be addressed concerns the reasons underlying the obstacles described above to the entrenchment of the liberal model of human rights in sub-Saharan Africa.

7.3.1 Cultural Distance

Even Kahn-Freund and Teubner, who emphasise that the process of global integration has rendered (the regional or national) cultural differences less strong, recognise that they still condition legal transfers. This is even more true in relation to sub-Saharan Africa particularly in the first decade of the post-decolonisation period. As Friedman has stated, culture plays the role of a "kind of intervening variable" in regard to law and determine the impact of legal norms on society.⁴¹⁸

As shown in the preceding chapter, the argument of African cultural diversity has been instrumentally used by African rulers to justify human rights violations. Nevertheless, it is true that the liberal human rights model is based on a perception of the relationship between the individual, society and power, as well as of the role of law and the meaning of justice, which is alien to traditional African legal and political culture and social organisation. The liberal human rights philosophy is based on the idea of entitlements of the individual vis-à-vis society and the state. This contrasts with the traditional African communitarian perception of the self, under which "personhood, in contrast to individualism in the West, is

⁴¹⁸ Friedman, *Is There a Modern Legal Culture?*, cit., p. 118.

intelligible only in the group and not against it".⁴¹⁹ Furthermore, the traditional understanding of power as personalised, unified and strictly tied with the dimension of the sacred⁴²⁰ clashed with the idea of the individual challenge to the political power. The lack of institutionalisation and corresponding personalisation of power in post-colonial African political systems reinforced the feeling that any challenge to state acts was in fact a challenge against the personhood of the head of state.

A further element of cultural distance between the liberal human rights model and African legal culture concerns the conception of justice and the role of law. In traditional African culture, justice is conceived in terms of mediation and its function is not to determine who is right or wrong between the parties involved in the dispute on the basis of an abstract rule but rather to safeguard harmony between the social groups concerned by the dispute.⁴²¹ This conception of justice is at the heart of the scepticism that both rural and also urban African communities displayed towards the state courts system and, instead, have continued to rely on traditional modes of dispute settlement.⁴²²

Finally, the economic rationale behind the liberal model of human rights to protect a sphere of autonomy from the state in which individual accumulation can be freely pursued was foreign to the communitarianist culture and social organisation of African societies.

A caveat should be made here. When dealing with the alien nature of the liberal philosophy in African culture, this refers not only to the attitude of the average African citizen, but also to African leadership. As Zimba has pointed out, the Western education of African political leadership should not be confused with the Westernisation of their culture due to the fact that although "African leaders were Western-educated they were brought up in

⁴¹⁹ J.R. Vincent, *Human Rights and International Relations*, Cambridge University Press, Cambridge, 1986, p. 39. See also C. Mojecwu, "International Human Rights: The African Perspective", in J. Nelson and V.M. Green (eds.), *International Human Rights: Contemporary Issues*, Human Rights Publishing Group, Strandfordville, N.Y., 1980.

⁴²⁰ See M. Kamto, *Pouvoir et droit en Afrique Noire*, in LGDJ, Paris, 1987.

⁴²¹ Du J. Bois de Gaudusson, "Le statut de la justice dans les Etats d'Afrique francophone", in G. Conac and J. Du Bois de Gaudusson (dir.), "La justice en Afrique", in *Afrique contemporaine*, n° spécial 156, 1990, p. 11. See also E. Grande, "Transplanting Alternative Dispute Resolution in the Horn of Africa: Some Issues of Law and Power", in L. Favali, E. Grande and M. Guadagni, *New Law for New States. Politica del diritto in Eritrea*, L'Harmattan Italia, Torino, 1998, p. 109 seq.

⁴²² As Bockel wrote in 1971: "*Quantitativement et surtout qualitativement, le juge est rarement saisi des litiges mettant l'Administration en cause*" and referred to Senegal where the Supreme Court, the only body competent to hear appeals for action *ultra vires*, used to deliver not more than three or four decisions each year; see A. Bockel, "Le juge et l'Administration en Afrique Francophone", in *Année Africaine*, Pèdone Ed., 1971, p. 27. See also I. Nguema, "Universalité et spécificité des droits de l'Homme en Afrique", in 43 *Revue Juridique et Politique Indépendance et Coopération*, 1989, p. 343 and P.F. Gonidec, "L'Etat de droit en Afrique. Les sens des mots", in 52 *Revue Juridique et Politique. Indépendance et Coopération*, 1998, p. 22; A. Moyrand, "Réflexions sur l'introduction de l'Etat de droit en Afrique noire francophone", in 4 *Revue internationale de droit comparé*, 1991, p. 876.

the traditional African way of life".⁴²³ Consequently, on the one hand, due to their Western education it was easy for them to accept or even desire Western models for their "prestige". On the other hand, however, their traditional upbringing had an impact on their commitment to these models. The overlap of these models is a characteristic which marks all spheres of post-colonial Africa. In this way, colonialism introduced cultural models in sub-Saharan Africa, as well as political, economic and social structures in which Westernisation and tradition coexisted and weakened each other's force.

7.3.2 The Lack of Preparation: The Colonial Legacy of Authoritarianism

The authoritarian experience of government imposed by colonial powers on African societies certainly did not provide a basis for the effective observance of human rights. As Callaghy wrote with reference to Zaire, Africa obtained a dual legacy from the colonial power upon independence: "an authoritarian one (colonial practice), and one stressing participation and equity (the metropolitan values of the colonial power). The former was implanted during seventy-five years of imperial domination; the other was a last minute hypocritical legacy".⁴²⁴ This provides clear evidence that the "careful implantation and cultivation" of the transferred institution which Teubner spoke about as a condition for the success of legal transfers was absent in sub-Saharan Africa.

The colonial administration was characterised by two elements: the discrimination between Europeans and Africans and the denial of the basic constitutional guarantees.⁴²⁵ The governor had extensive powers and was subject to little control from the metropolitan parliaments. The district commissioner had an even wider set of powers, which also included summary justice. Democratic institutions were introduced late and only a minority of Africans possessed the right to vote. Thus, the authoritarian and personalised mode of government, which dominated sub-Saharan African political scene until the end of the 1980s, had already been experienced during the colonial domination. Political detention or deportation, laws of sedition, restriction of movement, forced labour, denial of the right to strike or join trade unions had already been a common practice under colonial rule.

The authoritarian colonial experience had repercussions on the political culture of Africans. As Ghai has observed, the nature of colonial laws and administration had a double

⁴²³ Zimba, *The Zambian*, cit., p. 202.

⁴²⁴ T.M. Callaghy, *The State-Society Struggle: Zaire in Comparative Perspective*, 1984, p. 411 quoted in F. Reyntjens, *Authoritarianism in Francophone Africa from Colonial to Postcolonial State*, *Third World Legal Studies*, 1988, p. 76.

⁴²⁵ M. Guadagni (ed.), *Il modello pluralista*, Giappichelli, Torino, 1996, p. 48.

impact on the understanding and, therefore, on the modalities of the exercise of political power. It "had fashioned official attitudes and behaviour and the submissiveness of the people to authority".⁴²⁶ The colonial authoritarian legacy can also be found at the level of positive law as much of the illiberal legislation in force in the African states dated back to colonial times.

Finally, it should be taken into consideration that the nationalist leadership, which found themselves at the head of African states, did not have any experience of government. The small African educated élite was only formed and employed by the colonial powers to serve the colonial administration. Therefore, Africans achieved their independence, not only lacking any true experience of liberal-democratic government, but also without any direct experience of government *tout court*.

7.3.3 The Lack of Cultural Legitimacy and Commitment to the Liberal Model of Human Rights: Political, Economic and Cultural Dependence and the Role of Strategic Considerations

Although Watson has argued that legal change occurs independently from forces which are external to the legal sphere, the import of liberal-democratic constitutional models in sub-Saharan Africa was profoundly conditioned by non-legal actors and considerations. This has been clearly shown in the processes which led to the adoption of the constitutions of Zambia of 1964 and Benin of 1959 and 1960.

In Anglophone Africa, constitutions were the product of decisions taken by the colonial power with African nationalist leaders, neither of whom was concerned with designing a constitution to suit African needs and specificities. The former viewed the constitutions as a means to retain special links with the former colonies, to ensure the coexistence between all of the groups, interests and regions in the new states and above all, to provide the European minorities with sufficient guarantees at the end of the metropolitan rule.⁴²⁷ The main concern of the nationalist leaders was the swift transition to independence.

Apart from the specific modalities of the constitution-making processes, the fact that most sub-Saharan African constitutions were adopted before independence increased the influence of the colonial states and put them in the position of "*orienter, sinon dicter, les choix politiques des dirigeantes africains*".⁴²⁸ Therefore, Nwabueze's definition of the early

⁴²⁶ Y. Ghai, "The Kenyan Bill of Rights: Theory and Practice", in Alston, *Promoting Human Rights*, cit., p. 193.

⁴²⁷ See Fisher, *La décolonisation*, cit., pp. 806 and 822.

⁴²⁸ Gonidec, *Les droits*, cit., p. 78.

constitutions in terms of "colonial creations"⁴²⁹ seems to be a useful description of both English-speaking and French-speaking countries. In this case, he was referring to the colonial origin of the source of authority of the African constitutions, which was 'direct' in the case of the Anglophone countries and 'indirect' in the Francophone states. The definition of "colonial creations" can be used not only to describe the formal aspects of the constitution-making processes, as Nwabueze has done, but also the substantial conditions which influenced the contents of the constitutions which were based on the strong dependency of African countries on the European colonial powers. It cannot be overlooked that although the transfer of the European models was influenced by the colonial states, this was certainly made easier by the "acculturation juridico-politique",⁴³⁰ which was due to the European education and, in certain cases, the political experience of the African nationalist leaderships. The political leaders of the former French colonies were usually intellectuals, often lawyers, whose educational and political training took place in Europe.⁴³¹ Moreover, in some cases African leaders believed that the adoption of European models would confer a measure of prestige on the constitutional systems of the new independent African States, that Sacco points to as one of the main causes for the transplants. For this reason, it has been observed how the *mimétisme* was a phenomenon "psyco-sociologique".⁴³² Models earlier imposed (with the colonisation) were then "desired" because perceived as synonymous of modernisation and dignity.

The constitution-making processes of African constitutions have therefore shown that the import of the liberal-democratic model was a consequence of a political and cultural dependence of the African élites and also of an interaction of the strategies and goals of both the exporting and the importing actors.⁴³³ Along with the desire not to delay the independence or autonomy process, the other strategic consideration behind the constitutional protection of human rights lay in its legitimating function before the international community. This is confirmed by the fact that this model was retained in many countries even after the transition to authoritarianism.

⁴²⁹ B.O. Nwabueze, *Constitutionalism in the Emergent States*, C. Hurst, London, 1973, p. 23.

⁴³⁰ See J. Mbouendeu, "La brève et malheureuse expérience du régime parlementaire par les états africains", in 33 *Revue juridique et politique indépendance et coopération*, 1979, pp. 455-458.

⁴³¹ In the ex-French territories all of the political leaders, except for the President of Togo Sylvanus Olimpio, had a French political training. They had been members of the territorial assemblies or the Assembly of *l'Union française* or even ministers of the *République* such as F. Houphouët-Boigny, President of the Côte d'Ivoire. Lamine Gueye, Gabriel Lisette and Leopold Senghor had even participated in the *Comité consultatif constitutionnel* for the drafting of the French Constitution of 1958. See Gonidec, *Les droits*, cit., pp. 42-43 and Mabileau, cit., p. 27.

⁴³² G. Langrod, "Genèse et conséquence du mimétisme administratif en Afrique", in 39 *Revue internationale de science administrative*, 1973, p. 119, quoted in Darbon, cit., p. 117.

⁴³³ See B. Badie, *L'État importé*, Fayard, Paris, 1992.

The logic of dependence, which was at the origin of African constitutions and which underlies the introduction of this model of human rights, had a negative impact on the effectiveness of these constitutions. In particular, it undermined the cultural legitimacy of human rights norms, which as An-Na'im has strongly argued, is a pre-condition for their implementation. As he stated, "[t]o be committed to carrying out human rights standards, people must hold these standards as emanating from their worldviews and values, not imposed on them by outsiders".⁴³⁴

As the case of sub-Saharan Africa reveals, once political independence was attained, cultural independence was also claimed and all of the symbols of dependence had to be demolished. The situation of Benin is emblematic of this phenomenon, as after independence, the students and graduated from the university of Paris and Dakar, (i.e. the allegedly 'Westernised' elites), called for the establishment of a Marxist-Leninist system.

The modalities and the rationale for the transfer of the liberal human rights model undermined its (subjective) cultural legitimacy, in other words the way it was perceived by the recipient societies in Africa. The lack of cultural legitimacy prevented this model from being evaluated in sub-Saharan Africa in the light of the new threats to human dignity arising from the modern political organisation (the Western-modelled state) and also in the light of the ongoing changes to the traditional culture.

7.3.4 The Lack of Forces Supporting the Transferred Model: The Gap between the Formal and the 'Material' Constitution and the Weakness of African Civil Society

As shown above, Kahn-Freund has argued that "[t]he question in many cases is no longer how deeply [a transplanted institution] is embedded, how deep are its roots in the soil of its country, but who has planted the roots and who cultivates the garden".⁴³⁵ This statement indicates that the success of the legal transfer depends on the presence of forces supporting it in the recipient systems. This observation corresponds to the ideas of the theorists of the "material constitution", who explained that the effectiveness of a constitution depends on its legitimacy, meant as correspondence to the "material constitution". The latter in turn encompasses the forces keeping a stable organisation together in a network of relations.⁴³⁶ This correspondence between the formal and material constitutions was absent in sub-Saharan

⁴³⁴ An-Na'im, Conclusion, in *Human Rights in a Cross-Cultural Perspective*, cit., p. 431.

⁴³⁵ Kahn-Freund, cit., p. 13.

⁴³⁶ On the concept of "material constitution", see C. Mortati, *La costituzione in senso materiale*, rist., with foreword by G. Zagebelsky, Giuffrè, Milano, 1940 and voce *Costituzione dello stato*, *Enciclopedia Del Diritto*, Vol. XI, 1962.

Africa. Constitutions were the product of forces (colonial actors and African nationalist parties) which did not represent the material constitution of African states at all, or they represented it only partially. This was the case of the colonial power and African nationalist parties respectively. The multiplicity of identities, socio-political organisations, personalities, interests and values, which were rooted in traditional norms and practices were not represented in these processes.

In this way, it could be argued that the gap between the formal and the material constitutions is one of the main reasons behind the weakness of the African state. The modern state was an artificial creation and an imposition on the African societies, not a reflection of them. The model imported presupposed an already established nation, however, nationhood was not a reality but rather a goal to be attained in sub-Saharan Africa. As it has been often shown, the sense of ethnic and regional allegiance was accentuated by colonial policies. The sense of loyalty of African populations towards state institutions was therefore very weak.⁴³⁷ The weakness of the African state had a double impact on the human rights performance. Firstly, it contributed to the authoritarian shift of African states, which was justified by the need to capture forces which were escaping from their influence and even, in the situations of secessionist claims, which threatened their survival. Centrifugal (ethnic, regional or religious) strains contributed to the erosion of the constitutional human rights regimes in sub-Saharan Africa. Secondly, the sense of alienation of the state was also at the origin of the indifference of African masses to state politics and their endurance of its abuses. The sustainability of this attitude was linked to the level of protection ensured by a web of economic, legal and socio-political structures, which escaped the application of state law and power.⁴³⁸

In this way, it is clear that the ineffectiveness of the constitutional protection of human rights resulted not only from the lack of commitment to human rights on the part of African governments but also an absence of human rights mobilisation on the part of African

⁴³⁷ See Hyden, *The Challenges*, cit., p. 271. On this phenomenon, see Guadagni, *Il modello pluralista*, cit.

⁴³⁸ Gonidec referred to "*le développement de l'informel*" to designate the situation indicated above in which "*[l]e système d'État de droit, tel qu'il est défini par la loi fondamentale de l'État (Constitution), au lieu de régir la totalité de la société, ne règne plus que sur une partie de la société*", see Gonidec, *L'État de droit en Afrique*, cit., p. 19. A caveat is needed here. The structures belonging to the domain of the "informal", are not traditional *strictu sensu*, i.e. they do not mirror pre-colonial ones, but are an adaptation of traditional ways of handling economics, administration or justice in the post-colonial context. Therefore there are elements of hybridisation. Moreover, if traditional law is applied in rural areas, in the outskirts of African cities a "spontaneous law" regulates interpersonal relations, above all in the fields of family and economic relation. This law may have a very limited scope of application varying even from one city district to another, but in other cases may even overcome state boundaries affecting people linked by ethnic or kinship ties, see Guadagni, *Il modello*, cit., pp. 31-33.

civil society. The latter was due to the low level of human rights awareness, the existence of alternative forms of protection and also to the weakness of African civil society. This weakness was the consequence of coercion and also a strategy of the African ruling classes, which "either attempt[ed] to integrate the various social forces into single movements or set up intermediary and indirect means of control".⁴³⁹ Clientelism, administrative privileges and allocation of posts in the public sector on the basis of a system of ethnic solidarity⁴⁴⁰ was also an effective means to stifle popular discontent. The state compensated the denial of rights by distributing favours based on ethnic or regional membership. In this regard, Michalon has remarked how the greatest majority of African citizens, represented by the inhabitants of the rural areas of Africa, were indifferent towards the massive violations of civil and political rights, which was linked to the fact that the "*fonctionnement actuel de l'État répond(ait), malgré les apparences, aux atteintes du plus grand nombre*".⁴⁴¹

The above quoted comment of Kahn-Freund also explains the hurdles encountered by liberal human rights in another respect. Drawing from the image used by this author, it could be argued that sub-Saharan Africa lacked the subject who "planted" and "cultivated" the liberal garden in the West, in other words the bourgeoisie. When civil and political rights were introduced in Western constitutional systems, their respect was guaranteed by the fact that the wielders of state power represented and were a reflection of the bourgeois class, which benefited from a sphere of autonomy from the state guaranteed by these rights. This was not the case in sub-Saharan Africa. Colonial economic policy did not create the conditions for the emergence of an African bourgeoisie and instead created dependent, "[f]ragile, unstable and vulnerable economies" throughout the continent.⁴⁴² Therefore, the African ruling classes perceived the state as a source of accumulation of wealth and not as a possible obstacle to the enjoyment of the sphere of freedom which was seen in the West after the bourgeois revolutions as essential to economic advancement. Again the ineffectiveness of the constitutional protection of liberal rights can be explained in terms of a fracture between the interests protected by the formal constitution and those held by the existing social forces at the level of the material constitution.

⁴³⁹ J.-F. Bayart, "Civil Society in Africa", in P. Chabal (ed.), *Political Domination in Africa*, Cambridge University Press, Cambridge, 1986, p. 112.

⁴⁴⁰ Moyrand, *Réflexions*, cit., p. 863.

⁴⁴¹ T. Michalon, "Légitime malgré tout: l'État africain", in *Révolte et Société*, Actes du IV Colloque d'histoire au présent, Publications de la Sorbonne, 1987, p. 107 quoted in *ibidem*, p. 864.

⁴⁴² B. Munslow, "Why Has the Westminster Model Failed in Africa", in 36 *Parliamentary Affairs*, 1983, p. 222.

7.3.5 Ideological and International Relations-Linked Constraints

The critical economic situation in which African countries found themselves after the departure of the European colonial powers is at the origin of the ideology of developmentalism, which played a major role in the marginalisation of the human rights discourse in respect to the issue of development. This ideology "centres on the terrain of economics where both law and politics are superseded"⁴⁴³ and was not only used by rulers to justify human rights violations but was also at the basis of a long-standing underestimation of the relevance of human rights in relation to the issue of development, as seen in the preceding chapter.

Human rights concerns were also absent from international relations, which were dominated by a logic which was detrimental to human rights protection in sub-Saharan Africa. In the cold war context, human rights were not a factor which the world powers, including Western liberal-democracies, used in establishing economic and political relations with dependent African states. On the contrary, it even seemed more useful to them to have one strong interlocutor rather than dealing with the complexities of democratic procedures.⁴⁴⁴

Moreover, the ineffectiveness of human rights also depended on structural problems linked to underdevelopment: the ignorance of the law (the majority of the people were illiterate), the relatively high cost of the trials, the use of the language of the former colonial master, the concentration of courts in urban areas and the lack of adequate training for lawyers. These were the main factors that hindered or at least did not facilitate recourse to the state judicial for the enforcement of individual rights.⁴⁴⁵

7.4 What Prospects for the Liberal Human Rights Model in Sub-Saharan Africa?

What conclusions can be drawn from the experience of the liberal model of human rights in sub-Saharan Africa? There are two opposing positions on this issue in African scholarship. The first one is expressed by Okoth-Ogendo, who argues that in order for Africa to "develop a tradition of constitutionalism... Africa is destined to experience struggles and disappointments similar to those through which the older political systems went before viable mechanisms for the control, supervision and accountability of power can be developed and internalized".⁴⁴⁶

⁴⁴³ Ghai, *The Kenyan*, p. 385.

⁴⁴⁴ Ibidem, p. 239.

⁴⁴⁵ R. Degni-Segui, "L'accès à la justice et ses obstacles", in *28 Verfassung und Recht in Übersee*, 1995, pp. 449-467.

⁴⁴⁶ H.W.O. Okoth-Ogendo "Constitutions without Constitutionalism: Reflections on an African Political

Another position is advocated by Issa Shivji, who argues that it is necessary to apply a model alternative to the liberal-democratic one in sub-Saharan Africa, in which the right to self-determination and the right to culture are among the core elements. In particular, he argues for a conceptualisation of self-determination as a constitutional right of the nationalities within the post-colonial states. As far as the right to culture is concerned, Shivji stresses that this should be conceived as a collective right of nationalities "to pursue their own culture, language and the right of their children to be instructed in their own language".⁴⁴⁷ According to Shivji, the right to self-determination and culture are part of a model of "popular constitutionalism", which rests on two pillars, namely accountable/responsive state and collective rights/freedoms.

Both Okoth-Ogendo and Shivji's perspectives fall short of satisfactorily responding to the need to ensure the cross-cultural value of human dignity in sub-Saharan Africa. It is true that "liberal constitutionalism proved unable to accommodate the effects of the colonial and nationalistic activation of African society, which expressed itself in the assertion of ethnic, cultural, and religious distinctiveness, in the questioning of the terms of participation in the state and its spatial arrangements, and in associated demands for sectional sovereignty or autonomy".⁴⁴⁸ However only by focussing on collective identities, Shivji underestimates the process of individualism fuelled by urbanisation, the migration, the market economy and also the exposure to Western culture. In the 1960s, Glélé observed the individualistic ambitions of the educated youth of Benin, which co-existed with a communitarian interpretation of their achievements in their communities of origin. Furthermore, a case study conducted in 1976 on the Yombe people of Zambia revealed that labour migrants returning to their traditional communities expressed discontent with the material conditions of their lives, and began looking for satisfaction outside of the community.⁴⁴⁹ Moreover, Shivji also underestimates the potential discriminatory impact of a model of constitutionalism, which is based solely on collective rights. He contends that the recognition of the right to culture is compatible with the prohibition of discrimination on the grounds of race, religion, nationality or ethnicity. However, he fails to see how the right to culture may actually impinge on the principle of non discrimination, not only on the grounds mentioned but also on the basis of sex. Adopting a

Paradox", in Greenberg et al., (eds.), *Constitutionalism and Democracy: Transition in Contemporary World*, Oxford University Press, Oxford, 1993, p. 80.

⁴⁴⁷ Shivji, *State*, cit., p. 397.

⁴⁴⁸ E. Hutchful, "Reconstructing Political Space: Militarism and Constitutionalism in Africa", in Greenberg et al., cit., p. 218.

⁴⁴⁹ See G.C. Bond, *The Politics of Change in a Zambian Community*, The University of Chicago Press, Chicago and London, 1976.

holistic approach to culture, he fails to take into consideration the possibility of individual disagreement and the minorities existing within the groups who are the holders of collective rights. Therefore, his model may confront the same risks of assimilation that he denounced as one of the faults of liberal democratic constitutionalism. He fails to consider that "[t]he modern age is intercultural rather than multicultural" and therefore "the experience of cultural difference is *internal* to culture".⁴⁵⁰ Artificial state borders, migration and refugees flows are phenomena which affect the composition of African communities to a considerable extent and consequently, also the possibility of dealing with culture as an homogenous entity.⁴⁵¹

Okoth-Ogendo's perspective is valid as long as it points to the fact that, in order to flourish, constitutionalism needs to be understood as an expression of internal demand and also to have internal support. As argued in the previous section, the absence of this condition was one of the obstacles to the success of the liberal model in sub-Saharan Africa. However, similar to Shivij, Okoth-Ogendo seems to view Africa as an isolated continent, which is neither exposed nor affected by external values and events.

Moreover, a specific problem with Okoth-Ogendo's stance is that it assumes that the same forms of constitutionalism experienced in Western liberal democracies should be applied in sub-Saharan Africa. He does not question whether there is an alternative to the liberal model of human rights or whether this model is capable of accommodating African specificities. This question appears even more obvious if one considers that this model has evolved both within the domestic constitutional orders of Western democracies and at the international level. Liberalism has constituted the original philosophical source of the human rights regime, however this has subsequently incorporated values and concerns that do not belong to this tradition. In fact, a paradox of African constitutional history is the emphasis upon the protection of civil and political rights at a time in which Western human rights norms had already been enriched by second-generation rights. Moreover, many Western theorists, such as feminists⁴⁵² and multiculturalists,⁴⁵³ have highlighted the limits of the liberal

⁴⁵⁰ J. Tully, *Strange Multiplicity. Constitutionalism in an Age of Diversity*, Cambridge University Press, Cambridge, 1995.

⁴⁵¹ On a questioning of the group rights approach in the light of this situation see M. Mamdani, "Social Movements and Constitutionalism: The African Context", in Greenberg et al., cit., pp. 182-185.

⁴⁵² See for an overview of the similarities of multiculturalist and feminist critique of liberalism, A. Phillips, *Multiculturalism, Universalism, and the Claims of Democracy*. Prepared as part of UNRISD's work for the Beijing + 5 review (June 2000): Gender Justice, Development and Rights: Substantiating Rights in a Disabling Environment and published in M. Molyneux and S. Razavi (ed.), *Gender Justice, Development, and Rights*, Oxford University Press, Oxford, 2002, pp. 115-138.

⁴⁵³ See C. Taylor, "The Politics of Recognition", in A. Gutman (ed.), *Multiculturalism*, Princeton University Press, Princeton, 1994. For a multiculturalist position inserted in a liberal perspective see W. Kymlicka, *Liberalism, Community and Culture*, Oxford University Press, Oxford, 1989.

conception of human rights in its inadequacy to deal with diversity and pluralism and have also criticised the excessive individualism of the liberal rights discourse, which sacrifices personal, civic and collective responsibilities for the community.⁴⁵⁴

The two seemingly conflicting arguments, which have been developed in this chapter and the previous one, can be summarised as follows. On the one hand, it has been contended that the rejection of the liberal model of human rights is not well-founded in light of the presence of the modern state, and on the other hand, that the cultural and socio-political challenges of embedding liberal rights in sub-Saharan Africa in fact exist. These two arguments can be reconciled. As Bajart has argued this false dilemma needs to be overcome.

*“[L]’alternative n’est pas entre l’universalisme par uniformisation, au mépris de la diversité des “cultures”, et le relativisme par exacerbation des singularités “culturelles”, au prix de quelques valeurs fondamentales. L’universalité équivaut à la réinvention de la différence et il n’est nul besoin de faire de celle-ci le préalable de celle-là”.*⁴⁵⁵

The need to provide some form of protection for human dignity which is suitable to the modern African context in light of African specificities, such as communitarian identities⁴⁵⁶ and values, remain the most compelling challenge. Moreover, the recognition of African specificities should be provided through the adaptation of the model to the specific features of African recipient societies.⁴⁵⁷

Post-liberal constitutionalism, which is the concept used by Karl Klare to define the 1996 South African Constitution, attempts to achieve this aim. This term has very broad connotations, as it attempts to address a wide range of values and concerns. According to Klare, post-liberal constitutionalism combines collective self-determination with the liberal individual self-determination. It embraces “multiculturalism, close attention to gender and sexual identity, emphasis on participation and governmental transparency, environmentalism

⁴⁵⁴ This is the critique that Mary Anne Glendon addresses to the US rights talk, see A.M. Glendon, *Rights Talk. The Impoverishment of Political Discourse*, The Free Press, New York, 1991.

⁴⁵⁵ Bayart, *Illusion*, cit., p. 242.

⁴⁵⁶ There are several models which propose to recognise culture diversity. For a critical overview see R. Bellamy, “Dealing with Difference: Four Models of Pluralist Politics”, in 53 *Parliamentary Affairs*, 2000, pp. 198-217. See also Y. Ghai, *Autonomy and Ethnicity. Negotiating Competing Claims in Multi-Ethnic States*, Cambridge University Press, Cambridge, 2000.

⁴⁵⁷ On the need to recognise “the specificity of every culture and the need for transformative strategies in different societies” as an essential condition for avoiding the failure of human rights domestic and international protection, see P. Alston, “A Framework for the Comparative Analysis of Bills of Rights”, in Alston, *Promoting*, cit., pp. 3-4. In 1960, Northrop stated that “in introducing foreign legal and political norms into society, those norms will become effective and take root only if they incorporate also a part at least of the norms and philosophy of the native society”, see F.S.C. Northrop “The Comparative Philosophy of Comparative Law”, in 45 *Cornell Law Quarterly*, 1960, p. 657, quoted in Legrand, *The Impossibility*, cit., ft. 22, p. 118.

and the extension of democratic ideals into the 'private sphere'".⁴⁵⁸ In human rights terms, this means that along with the recognition of civil and political rights, this enriched version of constitutionalism, incorporates social and economic rights, affirmative duties on the state, cultural rights and the horizontal effects of the bill of rights. The accommodation of cultural specificities does not only relate to the content and the holders of rights, but also to the enforcement mechanisms.⁴⁵⁹ However, this accommodation is not unproblematic. As mentioned above and as it will be argued in more detail in Chapter 9, the recognition of multiculturalism in the form of collective rights poses serious questions for their reconciliation with individual rights, and particularly with the principle of non-discrimination.

⁴⁵⁸ K.E. Klare, "Legal Culture and Transformative Constitutionalism", in 14 *South African Journal of Human Rights*, 1998, p. 4.

⁴⁵⁹ The South African Constitution includes the right to bring a human rights case before the judiciary not only to "anyone acting in their own interest", but also to "anyone acting on behalf of another person who cannot act in their own name", "anyone acting as a member of, or in the interest of, a group or class of persons", "anyone acting in the public interest" and finally also "an association acting in the interest of its members" (Article 38). Moreover, it has enlarged the notion of enforcement beyond that of justiciability providing for a series of independent state institutions having powers of human rights promotion, investigation, monitoring, education, research, reporting and advice. They include the Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and the Commission for Gender Equality (Chapter 9). These provisions provide a response to the difficulty of individual citizens seeking judicial redress due to cultural reasons and also structural problems such as poverty and illiteracy.

PART III: HUMAN RIGHTS IN CONTEMPORARY CONSTITUTIONAL SYSTEMS

CHAPTER 8: Human Rights and the New Constitutions of the 1990s

8.1 The Constitutional Developments of the 1990s, African Struggles and Economic Conditionality

The beginning of the 1990s marked a new phase in the constitutional and political history of sub-Saharan Africa. This was due to the adoption of multipartism and organised elections in all of the countries which had been one-party or military states until then. This political change was constitutionally sanctioned. New constitutions were adopted or the existing ones were amended at such a rate that Glélé has described the region as affected by a “fièvre constitutionnel”.⁴⁶⁰ The main feature of this new constitutional phase is the renewed emphasis upon the principles and institutions of liberal democratic constitutionalism⁴⁶¹ with the corresponding incorporation of legally enforceable provisions devoted to the protection of human rights.

What are the causes of this constitutional activism and above all of the revival of the liberal-democratic model? The factors underlying this development can be explained by both endogenous and exogenous forces. Differences exist in the scholarly interpretation of these factors as the study of the Zambia and Benin cases will show. External factors, in the form of economic and political conditionality, intervened when internal demand for change was already present.⁴⁶² The constitutional developments of the early 1990s were directly linked to the failure of African political leaderships to accomplish the objectives which they had set out upon independence and which they also used to justify authoritarian regimes, such as the need to deal with under-development and to guarantee the coexistence of the diverse ethnic and religious groups within African society. The contrast between the poverty of the masses and the lifestyle and enormous fortunes of many African autocrats fuelled the rebellion of African masses, which expressed their resentment by not paying taxes, abstaining from elections and “withdrawing” in economic and political “informal” spaces. In the mid-1980s,

⁴⁶⁰ M. Glélé, “La constitution ou loi fondamentale”, in *Encyclopédie juridique de l'Afrique*, Tome I, cited in J. du Bois de Gaudusson, G. Conac and C. Desouches (eds.), *Les Constitutions africaines publiées en langue française*, Documentation française, Bruylant, Bruxelles, 1997, vol. 2, p. 9.

⁴⁶¹ The only partial exception to this trend is the 1995 Constitution of Uganda, which does not recognise the right to form and join parties, having opted for a “movement” model which is subject to periodical revision through referendum. A referendum was held in 2000 and this confirmed the ‘no-party’ system.

⁴⁶² See J.A. Wiseman, “Introduction: the Movement Towards Democracy”, in J.A. Wiseman, *Democracy and Political Change in sub-Saharan Africa*, Routledge, London and New York, 1995, p. 4.

the economic crisis, which was also due to the fall in commodity prices, became more acute and unbearable, and this tacit rebellion began to assume more vocal forms. The delay of several months in the payments of salaries, unemployment and even famine hit many sub-Saharan African countries. As a result, sub-Saharan African states were placed under the observation of the Bretton Woods institutions, which demanded the adoption of austerity measures to redress the crisis. These measures, in turn, entailed even bigger sacrifices for the populations, in terms of price increases, salary decreases and, in addition, a cut in the number of posts in the public sector. The impact of these policies on the population was dramatic, considering the fact that the public and parastatal sector absorbed between forty and sixty percent of the total workforce in sub-Saharan Africa. The dismissal of public employees without offering any safety nets for them and for their (extended) dependent families, in a situation of price increases, further undermined the legitimacy of African governments among their populations. In this way, citizens were paying a high price for the mismanagement of their government and the austerity measures laid down by the Bretton Woods institutions to redress it. The social and human costs were so high that by this stage, African citizens showed that they were not willing to bear the Structural Adjustment Policies (SAPs). SAP led to a climax in public outrage which had been simmering in recent years. Anti-SAPs protests took place in Nigeria, Ghana, Zaire, Zambia, Kenya and Benin. Students, trade unions, Christian churches and Islamic *confréries* were the most active actors in this mobilisation. An important role was also played by lawyers, including both professionals and academics. Support also came from the African Diaspora, which was composed of Africans exiled abroad. The inability of the regimes to sustain their clientelistic policies also ended up eroding the support they enjoyed within their own structures, including the party, the legislature and the army.

The opposition movement put forward a very simple, but 'revolutionary' demand, namely multi-party democracy. African civil society made the instrumental link between development and civil and political liberties, which had been so contested by African leaders and also by some scholars. The political demand also had a socio-economic motivation as citizens called for employment opportunities and decent living conditions. They also realised that the right to freely choose an accountable government was an essential step in achieving these objectives.

The success of the demand for freedom and democracy was certainly helped by the dramatic changes which were taking place in the international geo-political scene since 1989. The *perestroïka* introduced by Gorbachev in the USSR and the collapse of Communist

regimes in Central and Eastern Europe had a strong impact in sub-Saharan Africa. The knowledge of the fall of European Communist autocrats boosted the morale of Africans and they also realised that their struggle was capable of succeeding. At the same time, African regimes belonging to the Soviet orbit lost not only their main financial and military supporter but also the ideological reference, which they had used until then to justify their regimes. It is not by chance that the first countries to reintroduce multipartism were the Marxist states. The collapse of Communist regimes in Eastern and Central Europe also had a further consequence as it drastically changed international relations. Western powers could no longer justify also to their domestic public opinion that their support for authoritarian regimes was necessary to block the 'Communist risk'.⁴⁶³ A turning point in this respect was the meeting of the French President and the African Heads of States at La Baule in June 1990, when Mitterand declared that progress in democratisation would be awarded with a stronger cooperation. Due to the critical economic and financial situation and the lack of alternatives, only the President of Chad Hissène Habré challenged this declaration as an interference with the domestic affairs of his country. Following France, all of the other Western donors, including the UK, the USA, Germany, Canada, Belgium and the European Community started to use progress in political liberalisation as a condition to aid. The weight of this conditionality was extremely relevant, as African governments depended enormously upon external assistance. In parallel with donor countries, the Bretton Woods institutions also used political liberalisation as a condition for the continuation of their programs of structural adjustment. This modification in the international financial institutions' policies was also due to the realisation that their traditional theory that growth was only a matter of economic and financial policy was flawed. The failure of the structural adjustment programs of the 1980s in sub-Saharan Africa and the inability of African governments to repay their debts to the World Bank provided inescapable evidence. For this reason, the World Bank introduced the concept of 'good governance' in its jargon in the late 1980s. The World Bank observed:

"A root cause of weak economic performance in the past has been the failure of public institutions. Private sector initiative and market mechanisms are important, but they must go hand in hand with good governance – a public service that is

⁴⁶³ In fact, the terrorist attacks on the US on 11th September 2002 have had an impact on the attitude of Western, and in particular, US policy vis-à-vis human rights in sub-Saharan Africa. The 'fight against terrorism' has shaped US foreign policy. As before with the fight against the spread of the Soviet influence in sub-Saharan Africa, the Bush administration currently maintains good relations with states which have an appalling human rights performance and justify it with the priority of preventing international terrorism, see Human Rights Watch, African Overview at <http://hrw.org/wr2k2/africa.html>

efficient, a judicial system that is reliable, and an administration that is accountable to the public".⁴⁶⁴

Good governance certainly is a narrower concept than that of democracy and even more so than that of human rights, however it represented a significant evolution in the World Bank's neo-liberal approach, which had neglected the role of rules and institutions for the efficient functioning of the market until then.

Upon careful observation, we can see that differences existed between African civil society's demands and the content of political conditionality of the donor community. The claim for multiparty democracy by the former did not immediately correspond with the latter. Not all of the donors were willing to upset their African partners by introducing the issue of multi-party democracy. Douglas Hurd, the British Foreign Secretary, initially only spoke of good governance, as he believed that it was too soon to speak of democracy. Similarly, when the Minister for Overseas Development, Baroness Chalker, called for democracy, she justified it in mere economic terms, as in the case of the World Bank.⁴⁶⁵ In 1990, Jacques Chirac, the then mayor of Paris, bluntly stated during a trip to Benin that multipartism was not appropriate for Africa. However, the link between aid and democracy ultimately prevailed. Thus, Douglas Hurd, after initial hesitations, firmly indicated that democracy and human rights were a condition for aid: "Countries that tend towards pluralism, public accountability, respect for human rights, market principles, should be encouraged. Governments which persist with repressive policies, corrupt management, wasteful discredited economic systems should not expect us to support their folly with scarce aid resources which could be better used elsewhere".⁴⁶⁶ This declaration clearly summarises the political and economic models which African governments had to comply with if they wished to continue to receiving aid: liberal-democracy and free market.

The combination of the internal demand and the external pressures forced incumbent African governments to reintroduce political pluralism and formally to recognise it in renewed constitutional frameworks which guaranteed civil and political liberties.

⁴⁶⁴ World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth*, 1989, Washington D.C., p. vii.

⁴⁶⁵ See R. Dowden, "Reflections on Democracy in Africa", in *92 African Affairs*, 1993, p. 609.

⁴⁶⁶ Transcript of speech given to the Overseas Development Institute in London on 6th June 1990 cited in P. Slinn, "A Fresh Start for Africa? New African Constitutional Perspectives for the 1990s", in *35 Journal of African Law*, 1991, p. 3.

8.2 Human Rights Constitutional Protection in Context

The position of human rights in the new constitutional systems of sub-Saharan African cannot be appreciated if the context in which they were adopted is not taken into account. In this respect, it should be highlighted that in the 1990s, human rights had a prominent moral and legal force, in contrast with the 1960s.

Firstly, African governments were no longer in a position to challenge the legitimacy and allege the cultural 'foreignity' of the international human rights system. Since decolonisation, many international human rights instruments had been adopted with the participation of African sovereign states, and the adoption and even conceptualisation of some of these instruments owe much to the African contribution. This was the case, for example, with the 1966 ICESCR, the 1965 Convention on the Elimination of All Forms of Racial Discrimination (CERD) and 1986 Declaration on the Right to Development.

Moreover, the adoption of the African Charter on Human and Peoples' Rights in 1981 represented a commitment on the part of African governments to a human rights model which, despite some concessions to African values and traditions, is grounded on the principles within UDHR. Although the power of the African Charter was underestimated by African leaders, it had a significant impact in spreading the idea of human rights throughout the region and in providing Africans with a tool for challenging authoritarianism and abuses. African lawyers used the Charter to set up organisations in defence of human rights and to sensitise the population on human rights issues.⁴⁶⁷

The prominence that human rights have gained is also due the work of international human rights organisations like Amnesty International, which have fostered a global human rights culture and also contributed to the emergence of the idea that states can be judged on the basis of their human rights record. In the 1960s, international legitimacy could be sought through formal acts of incorporating of human rights norms in the constitutional systems. In the 1990s, States were judged on the basis of human rights compliance. This does not mean that international relations are always informed by this criterion as the Cold War period has shown in the past and as the events following the terrorist attacks of 11th September 2002 show today. However, dealing with states with a poor human rights record is perceived as a controversial issue and is often criticised by civil society around the world.

A further element which has conditioned the centrality of human rights is the flourishing of NGOs involved in international co-operation. They have often operated beyond

⁴⁶⁷ G. Conac, "Le processus de démocratisation en Afrique", in G. Conac (dir.) *L'Afrique en transition vers le pluralisme politique*, Economica Ed., Paris, 1993, p. 30.

the narrow development field and have been involved in human rights promotion by supporting African human rights associations or opposition parties. The 1990s also represented the decade of the blossoming of several African NGOs working on gender issues, environment, human rights and election monitoring. Until then, the few non-governmental organisations working in sub-Saharan Africa were branches of European-based NGOs, such as Amnesty International or la *Fédération Internationale des Droits de l'Homme*, and North American based non-governmental organisations.⁴⁶⁸ As the following chapter will show, African NGOs have played a fundamental role in fostering a human rights culture in the region and keeping a check on the action of the government. Among them, women's groups have proved to be the most active and aware.

The 1990s were the decade in which several conferences concerning human rights were held with the result of globalising the debate on human rights as well as giving human rights global visibility. The 1993 Vienna World Conference on Human Rights represented a crucial moment in the history of human rights in Africa because it marked the formal abandonment of any cultural relativist claim by African states. While Asian countries opposed the idea of universality of human rights,⁴⁶⁹ African countries supported the principle that "[a]ll human rights are universal, indivisible and interdependent and interrelated".⁴⁷⁰ This position also emerges from the Declaration adopted by the Ministers and representatives of the African States gathered at Tunis from 2nd to 6th November 1992 in preparation for the World Conference according to General Assembly Resolution 46/116 of 17 December 1991. This Declaration, known as the Tunis Declaration,⁴⁷¹ proclaims that "[t]he universal nature of human rights is beyond question"⁴⁷² and that "[t]heir protection and promotion are the duty of all states, regardless of their political, economic or cultural systems".⁴⁷³ In addition, it declares that "[t]he principle of the indivisibility of human rights is sacrosanct." Certainly African predisposition to adhere to the idea of universality of human rights can be explained not only by internal developments, including the adoption of a regional Charter on Human

⁴⁶⁸ A. Aidoo, "Africa: Democracy without Human Rights?", in 15 *Human Rights Quarterly*, 1993, p. 71.

⁴⁶⁹ See C.M. Cerna, "Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts", in 16 *Human Rights Quarterly*, 1994, p. 740; P. Van Dijk, "A Common Standard of Achievement. About Universal Validity and Uniform Interpretation of International Human Rights Norms", in 13 *Netherlands Quarterly of Human Rights*, 1995, p. 105.

⁴⁷⁰ See World Conference on Human Rights, Vienna, 14-25 June 1993, *Vienna Declaration and Programme of Action*, I para. 5, Distr. GENERAL A/CONF. 157/23 12 July 1993 at <http://www.unhchr.ch/html/menu5/d/vienna.htm>

⁴⁷¹ See World Conference on Human Rights, *Report of the Regional Meeting for Africa of the World Conference on Human Rights*, Tunis, 2nd-6th November 1992, Distr. GENERAL A/CONF. 157/PC/57 2 November 1992, at <http://www.unhchr.ch/html/menu5/wctunis.htm>

⁴⁷² Par. 2.

⁴⁷³ Ibidem.

Rights, but also with the fact that African states enjoy a much weaker position than the Asian ones vis-à-vis Western countries. Having lost any alternative economic, military and ideological support, they had no real choice but to adhere to the ideals promoted by the West.⁴⁷⁴

These Conferences provided a valuable forum for discussion. For example, since the Fourth World Conference on Women held in Beijing in 1995, these conferences have been open to civil society organisations, thus, giving the opportunity to African NGOs to network with other African and non-African organisations. Although the 'information revolution' has only affected sub-Saharan Africa to a limited extent in comparison to other regions, it has also helped sub-Saharan African civil society groups working in the field of human rights promotion or protection to exchange information and to build alliances. The contemporary era is characterised by the combination of actions, not necessarily operating in coordination. Western civil societies are increasingly aware of events elsewhere and increasingly exert pressure on their governments not to support administrations violating human rights. Governments cannot ignore this pressure, not only because of its moral force, but above all for electoral and financial reasons (in the case for example of the customers' action). This action reinforces the work done in parallel by non-Western civil societies' groups, which is addressed to their own governments.

In conclusion, as Wilson has stated: "[t]he past few decades have witnessed the inexorable rise of the application of international human rights law as well as the extension of a wider public discourse on human rights, to the point where human rights could be seen as one of the most globalised political values of our time".⁴⁷⁵

The force of human rights rests on their effectiveness as a tool to articulate and communicate claims and to denounce injustice. Women, indigenous peoples, ethnic minorities express their claims before national or international institutions in terms of human

⁴⁷⁴ The only concession made to a distinctive African approach to human rights was the emphasis given to second generation rights and to the right to development: *[p]olitical freedom when not accompanied by respect for economic, social and cultural rights is precarious. The right to development is inalienable. Human rights, development and international peace are interdependent.*"⁴⁷⁴ Furthermore, African countries reaffirmed their attachment to the right to self-determination and free choice of their political and economic systems and institutions. Moreover, they affirmed that the institutional means to translate the principles set out in the International Bill of Right and in the African Charter into practice are a matter of internal choice. After having stated that "*[t]he observance and promotion of human rights are undeniably a global concern and an objective to the realisation to which all States, without exception, are called upon to contribute*", they went on to add that "*no ready-made model can be prescribed at the universal level since the historical and cultural realities of each nation and the traditions, standards and values of each people cannot be disregarded*" (para. 5). This latter principle was, however, also asserted by the Final Declaration of the Vienna Conference.

⁴⁷⁵ Wilson, Human Rights, Culture and Context, cit., in Wilson, Human Rights, Culture & Context, cit, p. 1.

rights. Human rights have thus become a 'cultural practice',⁴⁷⁶ employed by different social actors for diverse aims.

The constitutions enacted in sub-Saharan Africa in the 1990s reflect the prominence that human rights have gained both at international level and more specifically, at regional (African) level. Furthermore, they also express the dual function of human rights today. On the one hand, human rights are used as a criterion in the relationship between aid donors and recipients, and they are also used in the political discourse of African leaders, although this is often of a rhetorical nature. On the other hand, it is a 'language of emancipation'.⁴⁷⁷ This language, which was created in another cultural context, has been subject to a process of appropriation by the African masses. The analysis of the processes which has led to the democratic transition, and which will be carried out in the next sections, will highlight the internalisation of the human rights language in the African civil societies' discourses on political power. In the 1990s, the most vocal advocates of the universal validity of human rights are African civil society groups, which often accuse Western powers of being too tolerant towards African authoritarian states, along with applying a double human rights-standard, with one for the West and another for Africa. However, the universal discourse on human rights is more problematic when private relationships are involved. In this case, resistances still exist, even though an active and mature women movement is struggling for the advancement of women's rights.

The following chapters will attempt a more detailed examination of the factors and the actors which brought liberal civil and political rights back into African constitutional systems. Moreover, they will also specifically assess the approach which has been adopted towards human rights in the constitutional texts and in governments' practices as well as civil societies' reaction to such practices. The analysis of the human rights norms and practice and civil societies' discourses will be conducted taking into account the influence of the dominant neo-liberal policies upon them. The neo-liberal economic agenda imposed by the Bretton Woods institutions and the Western donors has put a new dynamic in motion, and this has had contrasting results. This agenda conditions the liberal bias of contemporary African constitutionalism and governmental policies. However, at the same time this has provoked reactions from civil society who have moved from a mobilisation based on the claim for civil and political freedom, and have begun to claim social and economic rights. Interestingly, this

⁴⁷⁶ See Preis, Human Rights, cit., p. 286 et seq.

⁴⁷⁷ B. de Sousa Santos, "Toward a Multicultural Conception of Human Rights", in 1 *Sociologia del Diritto*, 1997, p. 27.

reaction can also be found in international human rights organisations such as Amnesty International, whose mandate was amended in 2001 to incorporate social and economic rights.

CHAPTER 9: Anglophone Africa

If it is true that the constitutional renewal of the early 1990s affected the whole region, it is equally true that differences still remain between Anglophone and Francophone Africa. The latter includes common features both in terms of the constitution-making processes and the approach to the constitutional protection of human rights, while the former has displayed a more varied picture. Some countries, such as Zambia, Kenya,⁴⁷⁸ Botswana,⁴⁷⁹ Mauritius⁴⁸⁰ and Zimbabwe,⁴⁸¹ have opted for the revision of the constitutions in force, while others have adopted new constitutions. This is the case of Uganda,⁴⁸² Sierra Leone,⁴⁸³ Gambia,⁴⁸⁴ Ghana,⁴⁸⁵ Malawi,⁴⁸⁶ Lesotho⁴⁸⁷ and Nigeria.⁴⁸⁸ Moreover, Tanzania's Constitution of 1977 is still in force. In 1984, sections two and three on "Objective of Government Affairs" and "Rights and Obligations" were introduced with Act 15 of 1984. This amendment entered into force on 15th March 1988.

When dealing with Anglophone Africa, it is important to take into account that many one-party constitutions were in fact revised versions of the independence constitutions. When the constitutions in force were amended in the 1990s, in reality, the original text of the 1960s was retained with only a few changes. In this way, the limitations that those constitutions incorporated in relation to human rights ultimately re-appeared in the new constitutions. In particular, this refers to the exception clauses and the derogative provisions. It also indicates that these constitutions had a strictly liberal inspiration.

9.1 Zambia: The 1991 Constitution

9.1.1 Process and Actors which led to the Adoption of the 1991 Constitution

Recent constitutional developments in Zambia have been the outcome of the strong mobilisation of civil society against one-party rule. The popular dissatisfaction with regard to the government began soon after the introduction of unipartism and in particular, after the economic crisis in 1974. The opposition to the regime was carried out by highly politicised

⁴⁷⁸ Amended in 1991 to permit multipartism and then in 1997.

⁴⁷⁹ Amended in 1992 and then in 1997.

⁴⁸⁰ Amendments entered into effect in 1992.

⁴⁸¹ Amended in 1993.

⁴⁸² In 1995.

⁴⁸³ In 1991.

⁴⁸⁴ In 1995, entered into effect in 1997.

⁴⁸⁵ In 1992.

⁴⁸⁶ In 1995.

⁴⁸⁷ In 1993.

⁴⁸⁸ In 1999.

civil society organisations,⁴⁸⁹ particularly the Christian churches, the business community, the legal profession, the universities and, above all, the trade unions.⁴⁹⁰ This opposition increased at the end the 1980s following the collapse of Communist regimes events in Eastern and Central Europe⁴⁹¹ and the worsening of the economic situation since the early 1980s, which was due to a great extent to the fall in copper prices, which is the major export of Zambia. The structural adjustment measures imposed by the Bretton Woods institutions made the dissatisfaction with the regime even more acute. The demands for democracy were also an outcome of the opposition to the structural adjustment programs, which the government had to accept as a condition for receiving aid from the World Bank and the IMF. Kaunda implemented a structural adjustment programme in 1983, which encompassed, inter alia, the devaluation of the currency, the limitation of wage increases to five percent (later raised to ten per cent due to trade unions' opposition), the removal of control of prices and subsidies on maize and fertilisers, as well as the adoption of the foreign auction system. These measures benefited foreign enterprises, but they almost destroyed Zambian manufacturing firms in both the private and the public sectors, provoked a devaluation of the local currency and an increase of the prices of basic commodities and, above all, led to the loss of employment for thousands of people. By the end of 1993, 8,500 workers lost their jobs in the textile industry. This dramatic situation provoked protests, rallies and riots which convinced Kaunda to cancel the IMF agreement and to adopt an Interim New Economic Recovery Programme (INERP), which was based on a philosophy which was completely different to that underlying the structural adjustment programme. The exchange rate was fixed at Kwacha 8 to one dollar (this had previously been Kwacha twenty-one to one dollar), price controls, the limitation of debt service to ten percent of foreign exports receipt and the nationalisation of private milling companies were introduced. The implementation of INERP was followed by a growth of 6.2 percent rate in real GDP. It should be recognised that, however, this was largely due to an exceptional maize harvest. Despite these results, INEPR was interrupted because both the

⁴⁸⁹ See G.F. Longu, "The Church, Labour and the Press in Zambia: The Role of Critical Observers in a One-Party State", 85 *African Affairs*, 1986, p. 394.

⁴⁹⁰ The labour movement was strong. According to Zambian law (see section 15 of the Industrial Relations Act, CAP. 517) each industry had its union. All unions composed the Zambia Congress of Trade Unions (ZCTU) which represented 80 percent of the total labour force in formal employment. Its membership was wider than that of UNIP, in respect to which ZCTU was able to remain independent despite the efforts of the party to co-opt ZCTU leaders. The opposition to the politics of the Government even resulted in three months prison, without trial, for the chairman Chiluba and other three leaders of the ZCTU. At the end of 1989 the ZCTU General Council decided to lead the struggle for the reintroduction of political pluralism; see A.W. Chanda, "Zambia's Fledgling Democracy: Prospects for the Future", 25-28 *Zambia Law Journal*, 1993-1996, pp. 131-32.

⁴⁹¹ In 1989 Chiluba declared: "If the owners of socialism have withdrawn from the one-party system, who are Africans to continue with it?", *Times of Zambia*, 31 December 1989.

Bretton Woods institutions and bilateral donors refused financial support. The government was thus compelled to re-enter an agreement with IMF and, in order to obtain a loan in 1989, to adopt a Policy Framework Paper, which laid down a plan for the economic reform to be implemented between 1990 and 1993 according to the IMF dictates. The conditions imposed by the IMF included the decrease of maize subsidies and the shrinking of social expenditure to reduce the budget deficit. In June 1990, the prices of high-grade maize meal increased by more than the double. This stirred up further riots, which led Kaunda to request the IMF for a temporary suspension of the planned reduction of maize mail subsidies. The IMF rejected this demand and even suspended the financial payment to Zambia. Attention was not paid to the hardship that the implementation of the structural adjustment was inflicting upon the population, above all in terms of price increases and job losses. In 1975, twenty-six percent of the labour force was in wage employment compared to ten per cent in 1991.⁴⁹² Despite the support for privatisation, the trade unions opposed the removal of maize subsidies, labour redundancies and privatisation in certain sectors which are considered as strategic, such as the mines. The discontent with the SAP also came from the business community, which largely was in favour of some of the measures of the structural adjustment package, such as privatisation and the liberalisation of the exchange rate. The import and trade liberalisation was only favoured by large firms, notably the foreign ones. Economic discontent turned into political protest. Together with the labour movement, part of the business community called for a democratic change. The response to the popular demand for multipartism was made by President Kaunda in March 1990 by promising to hold a referendum on this issue. The climate was such that Kaunda was forced to accept the reintroduction of political pluralism without resorting to the referendum. A climate of violence was heightened by an attempted coup d'état at the end of June⁴⁹³ and massive popular rallies⁴⁹⁴ calling for the end of the regime. Thus, the government promised that elections would be held by the end of 1991, in other words, before the natural end of the term of the government. In July, a National Conference on the Multi-Party Option was held in Lusaka.⁴⁹⁵ The pro-democracy organisations led to the creation of the National Interim Committee for Multiparty Democracy

⁴⁹² N. Simutanyi, "The Politics of Structural Adjustment in Zambia", in 17 *Third World Quarterly*, p. 836.

⁴⁹³ Before the attempted coup, the situation was already critical. The government decision to raise the price of food, particularly that of maize meal, provoked three-days of riots in the capital and in other towns in June. 27 people were killed by security-forces, a thousand were put under arrest and a curfew was raised.

⁴⁹⁴ See M. Bratton, "Zambia Starts Over", in 3 *Journal of Democracy*, 1992, p. 81.

⁴⁹⁵ See *The Hour Has Come*, Proceedings of the National Conference on the Multi-Party Option, held in Lusaka, Zambia, 20th-21st July, 1990, edited by A. Mbikusita-Lewanika and D. Chitala, Zambia Research Foundation, Lusaka, 1990.

(NICMD). In December 1990, Article 4 of the 1973 Constitution was repealed and consequently political pluralism was reintroduced. This allowed NICMD to register itself as a political party in January 1991 with the name of Movement for Multiparty Democracy (MMD) under the chairmanship of Frederick Chiluba, the former President of the Zambian Congress of Trade Unions (ZCTU).

Before adopting the constitutional amendment which opened the way to multipartism, the government had formed a Constitutional Review Commission on 8th October 1990 chaired by the Solicitor-General Professor Patrick Mvunga with the task of drafting a new Constitution.⁴⁹⁶ The MMD reacted negatively to the establishment of the Mvunga Commission and the draft constitution as it advocated the reintroduction of the 1964 Constitution with the necessary amendments. This was due to their distrust for a text elaborated by UNIP's government, and one that would require approval by a Parliament still dominated by the single party. The situation of stalemate was overcome as a result of the churches' efforts which resulted in a National Conference where agreement was reached on the review of the 1973 Constitution between the government and MMD. The new Constitution was enacted by the Parliament on 2nd August 1991 and approved by the President on 29th August 1991. This was followed by the holding of parliamentary and presidential elections on 31st October, which witnessed the overwhelming victory of the MMD. Chiluba was elected President with seventy-six percent of votes and the MMD obtained one hundred twenty-five out of one hundred fifty seats in the National Assembly. Kenneth Kaunda, who had been President from 1964, gave up his position without putting up any resistance.

9.1.2 The Mvunga Constitutional Review Commission and the Constitutional Protection of Human Rights

The decision by the two opposing political forces in Zambia to merely reproduce the provisions on human rights contained in the 1964 Constitution, which was probably due at the time to the desire to hasten the formal end to the single-party rule, does not allow us to evaluate whether the approach to human rights has changed since then. However, the consultation process which preceded the adoption of the 1991 Constitution reveals the way in which contemporary Zambian civil society perceives the constitutional protection of fundamental rights and freedoms. As stated above, the adoption of the 1991 Constitution was

⁴⁹⁶ Statutory Instrument No. 135, 1990.

preceded by the appointment of a constitutional commission which toured the country gathering views on the future constitution by holding public hearings from 18th October 1990 to 18th January 1991. The Mvunga Commission heard oral submissions from 586 petitioners including representatives of the UNIP, the MMD as well as other organisations and associations. It further received 401 written submissions. The activity of the Commission along with its recommendations were summarised in a Report presented to the government in April 1991,⁴⁹⁷ which, in turn, replied with a White Paper.⁴⁹⁸ Although the Commission's work was not considered in the drafting of the 1991 Constitution because of the opposition of the MMD, it is useful to consider it as a testimony of the views of the Zambian citizens and civil society organisations upon the issue of the constitutional protection of fundamental rights. According to the Report, during its tour the Commission had the "impression" of the existence of *"a mood of anxiety, impatience and desperation among some Petitioners; some submissions reflected a resentment of the One-Party Rule of the past seventeen years"*. Some petitioners translated these feelings into rather lucid proposals on the matter of human rights which had led to the overthrow of the single-party regime. The Report testifies that some petitioners were *"greatly (emphasis added) concerned about the basic human rights and the place they should occupy in the new Constitution. The majority strongly recommended the inclusion of a much more comprehensive Bill of Rights and the ratification of other recognised rights such as the International Bill of Rights and the African Charter on Human and Peoples' Rights"*.⁴⁹⁹ Therefore, at least some segments of Zambian civil society seemed to possess a level of human rights awareness which the political leadership failed to acknowledge in the 1991 Constitution.

9.1.3 The Bill of Rights

The 1991 Constitution marked for Zambia the re-constitutionalisation of political pluralism and the re-adoption of the liberal-democratic model. Article 1 sanctions the end of the one-party era and the supremacy of the constitution: "this Constitution is the Supreme Law of Zambia and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void".

The 1991 Constitution reproduces most of the provisions of the 1964 document including the bill of rights which is contained in Part III entitled *"Protection of Fundamental*

⁴⁹⁷ *Report of the Constitution Commission*, Lusaka, April 1991.

⁴⁹⁸ Government Paper No. 2 of 1991.

⁴⁹⁹ These proposals, which were re-presented in 1996, will be analysed in the next section.

Rights and Freedoms of the Individual". The rights safeguarded are: the right to life; the right to personal liberty; freedom from slavery and forced labour; freedom from inhuman treatment; the right to property and freedom from its deprivation; the right to privacy of home and other property; the right to protection of the law; freedom of conscience including freedom of thought and religion; freedom of expression; freedom of assembly and association; freedom of movement; freedom from discrimination on the grounds of race, tribe, sex, place of origin, marital status, political opinions, colour or creed. The only provisions, which were absent from the 1964 document, concern the protection of young persons from exploitation⁵⁰⁰ and the addition of sex and marital status as prohibited grounds of discrimination.⁵⁰¹ These two innovations already indicate the progress made in the human rights protection and the influence exerted by international human rights standards. As in the 1964 constitution, political rights are guaranteed by Part V in sections 64-65 dealing with the qualification for election to the National Assembly and section 75 on the right to vote. The independence of the judiciary is guaranteed by the Constitution and by the Judicature Administration Act.⁵⁰²

The 1991 Zambian Constitution still includes limitation clauses and derogative provisions which were present in the 1964 Constitution, and which, as referred to in Part I, are not in compliance with the International Bill of Rights. However, the right to personal property is subject to the same regime as provided in the 1973 Constitution. Article 16(2) of the 1991 Constitution lists some twenty-seven cases in which an individual can be deprived of his or her property. Moreover, the Constitution merely provides, in default of an agreement, that an Act of Parliament shall provide that the amount of compensation which shall be determined by a court.⁵⁰³ The 1964 Constitution was more precise on this point as it mentioned the "prompt payment of adequate compensation".⁵⁰⁴

⁵⁰⁰ Article 24 declares that "(1) No young person shall be employed and shall in case be caused or permitted to engage in any occupation or employment which would prejudice his health or education or interfere with his physical, mental or moral development. Provided that an Act of Parliament may provide for the employment of a young person for a wage under certain conditions. (2) All young persons shall be protected against physical or mental ill treatment, all forms of neglect, cruelty or exploitation. (3) No young person shall be subject of traffic in any form." According to Article 24 "young persons" denotes persons under the age of fifteen years.

⁵⁰¹ Article 23.

⁵⁰² Chapter 24 of the Laws of Zambia. Other relevant instruments include the Judicial (Code of Conduct) Act, 1999 and the Judges (Conditions of Service) Act No. 14 of 1996.

⁵⁰³ Article 16 (3).

⁵⁰⁴ Article 18 (2).

9.1.4 Seeking to Accommodate Domestic Traditional Norms within the Human Rights Constitutional Framework

One of the most controversial provisions included in the 1991 Zambian Constitution is embodied in Article 23(4), which allows for exceptions to the principle of non-discrimination sanctioned in paragraphs 1 to 3. The first “victims” of this clause are women. Despite the inclusion for protection against sex-based discrimination, for the first time in the Zambian Constitution, in response to the mobilisation of women’s groups, Article 23(4) was left unmodified in respect to the version contained in the 1964 Constitution.⁵⁰⁵ This provides that the clause which states that “no law shall make any provision that is discriminatory either of itself or in its effect”⁵⁰⁶ does not apply “to any law so far as that law makes provision - (a) for the appropriation of the general revenues of the Republic; (b) with respect to persons who are not citizens of Zambia; (c) *with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law*; (d) *for the application in the case of members of a particular race or tribe, of customary law with respect to any matter which is applicable in the case of other persons*; or (e) whereby persons of any such description as is mentioned in clause (3)⁵⁰⁷ may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society” (emphasis added). The exceptions indicated in paragraphs (a), (c) and (d) provide the constitutional legitimisation for both statutory and customary laws which discriminate against women. This provision is not in compliance with the International Bill of Rights and the other human rights treaties ratified by Zambia,⁵⁰⁸ including a

⁵⁰⁵ The 1973 Constitution omitted sex as a ground of discrimination, even though the Chona Commission recommended its inclusion and the Government accepted this recommendation, see Zambia, Recommendations of the Chona Commission, cit. and Govt. Paper, No. 1, cit. Even in 1991, the insertion of sex discrimination was not easy. Sex discrimination was only included “in a piecemeal manner after much agitation from women’s groups”, T. Kankasa-Mabula, “The Enforcement of Human Rights of Zambian Women: *Sarah Longwe v Intercontinental Hotel* Revisited, in 21-24 *Zambia Law Journal*, 1989-1992, p. 34.

⁵⁰⁶ Article 23(1).

⁵⁰⁷ Clause 3 contains the definition of the term “discrimination”.

⁵⁰⁸ These are the Convention on the Elimination of All Forms of Discrimination Against Women adopted 18th Dec., 1979, entered into force 3rd Sept., 1981, G.A. Res. 34/180, UN Doc. A/RES/34/180 (1980); the Convention on the Political Rights of Women, opened for signature Mar. 31, 1953, entered into force 7th July, 1954, G.A. Res. 640 (VII), 27 U.S.T. 8389, T.I.A.S. No. 8289, 193 U.N.T.S. 135; the Convention for the Suppression of the Traffic in Persons and of Exploitation of the Prostitution of Others 1949, adopted 2nd Dec., 1949, entered into force 25th July, 1951, G.A. Res. 317 (IV), 96 U.N.T.S. 271; The Supplementary Convention on the Abolition of Slavery, The Slave Trade and Practices similar to Slavery concluded 7th September, 1956, entered into force 30th April, 1957, 266 UNTS 3; the Convention on the Nationality of Married Women, adopted 29th January, 1957, entered into force 11th August, 1958, 309 UNTS 65; the ILO Convention on Equal Pay for Work of Equal Value, 1951 (No. 100), ILO Convention on Discrimination (Employment and Occupation), 1958 (No. 111). Among the treaties concerning women, the only one which Zambia has not

fundamental treaty in the field, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Article 23(4) also contrasts with the recent stands that Africa as a continent has been taking in the last years as witnessed at the recent World Conference of Vienna on Human Rights and the Beijing Fourth World Conference on Women in 1995.

The exclusions of the "private" from the application of the principle of non-discrimination contrasts with the Zambia's obligations under CEDAW, which extends the prohibition of discrimination to the private sphere.⁵⁰⁹ However, in contradiction with this approach, the Zambian Constitution has excluded the "private" from the scope of application of the principle of non-discrimination, including not only "private life" but also any relationships with private actors, even outside private life. The Zambian Constitution prohibits discrimination merely in relation to laws⁵¹⁰ and treatment by persons acting by virtue of a written law or in performance of the functions of a public office or a public authority.⁵¹¹ Nevertheless, a courageous step has been taken by the Zambian judiciary in 1993 in the case of *Sarah Longwe v Intercontinental Hotel* (1992/HP/765). In this case, the court gave

ratified is the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, opened for signature 10th Dec., 1962, entered into force 9th Dec., 1964, G.A. Res. 1763A (XVII), 521 U.N.T.S. 31.

⁵⁰⁹ Traditionally, international human rights law and national Bills of Rights did not grant human rights protection in the private sphere. In human rights literature, the term "private" refers either to the "nature or character of the actor" committing a human rights violation (governmental or non-governmental), or to the "different spheres of life and action. The 'private' is frequently associated with the home, family, domestic life: salaried employment, business, professions, the give and take of the market, being out of the world"; see Steiner and Alston, *International Human Rights*, cit., p. 945. Conversely CEDAW also applies to the private sphere. Its preamble states that "a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women". More importantly, under the terms of the Convention, discrimination consists of "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field". The definition, therefore, does not refer exclusively to state action or actions in pursuance of a law and, by using the expression in "any other field", also refers to the private sphere. Article 2 of the Convention also refers to private actors and it requires states to adopt appropriate measures to eliminate discrimination against women which may be carried out "by any person, organisation or enterprise" (Article 2(e)). In international law, other steps towards widening the application of the human rights regime to private life has been taken; see the Declaration on the Elimination of Violence Against Women, adopted 23rd Feb. 1994, G.A. Res. 48/104, UN GAOR, 48th Sess., Agenda Item 111, UN Doc. A/Res/48/104 (1994) and the 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women ("Convention of Belédo Pará") adopted 9th June 1994, OAS/Ser.L.V/II.92/doc. 31 rev. 3 (1994), not in force. In the same direction, within jurisprudence, see *Velasquez Rodriguez v Honduras* case, Judgement of 29th July 1988, Inter-Am. Court of Human Rights (Ser. C), No. 4, 9 *Human Rights Law Journal*, 1988, p. 212. The importance of this judgement lies in the clear definition of the state's duty in relation to violations imputable to non-governmental subjects. The Court stated that "[a]n illegal act which violates human rights and which is initially not directly imputable to a State ... can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent violation or to respond to it as required by the Convention" (para. 172).

⁵¹⁰ Article 23, para. 1.

⁵¹¹ Article 23, para. 2.

horizontal effect to the principle of non-discrimination. The case concerned a practice carried out by Zambian hotels which prevented unaccompanied women from entering hotel bars. The court ruled against the Hotel and it found that this practice was discriminatory against women. The court, which was not able to refer to Article 23, based its ruling on Article 11, which provides that every person in Zambia is entitled to the fundamental rights and freedoms regardless of his or her race, place of origin, political opinions, colour, creed, sex or marital status.⁵¹²

In a similar way that the private/public distinction is used to justify sex discrimination, the priority given to customary law in the constitution is in contradiction with CEDAW and the approach taken by Africa on this issue. CEDAW, indeed, affirms that states undertake "*to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women*".⁵¹³ This undertaking has been reaffirmed on the occasion of the UN Conferences in Vienna and Beijing, and unambiguously supported by African States. In the Vienna Declaration and Programme of Action, it is declared that "*[t]he human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on the grounds of sex are priority objectives of the international community*" (para. 18). This position was taken also at the regional meeting for Africa held in Tunis in 1992 in preparation for the Vienna Conference. On this occasion, African States emphasised their commitment to "*work for the rapid elimination of all forms of discrimination against women*", and called upon "*member States to take all appropriate measures in order to promote the rights of women, to put an end to discrimination based on sex and to protect women from all forms of violence and traditional practices of intolerance and extremism, particularly religious extremism, affecting their rights and freedoms*".⁵¹⁴ This position was confirmed at the Fifth Regional Conference on Women at Dakar in 1994, in preparation for the Beijing Conference. In the African Platform for Action⁵¹⁵ issued by the Regional Conference, it was noted that most African countries have included the principle of

⁵¹² For a review of this case see Kankasa-Mabula, *The Enforcement*, cit., pp. 30-47. This ruling will be further examined in the section concerning Zambian jurisprudence on human rights.

⁵¹³ Article 2(f).

⁵¹⁴ See Report of the Regional Meeting for Africa of the World Conference on Human Rights, cit., AFRM/13, para. 5.

⁵¹⁵ African Platform for Action adopted by the Fifth Regional Conference on Women, held in Dakar from 16th to 23rd November 1994. Distr. GENERAL E/CN. 6/1995/5/Add., 29th December 1994 at gopher://gopher.undp.org: 70/00/ecosocdocs/sow/1995/1995—5.en2

equality between men and women in their constitutions and it is recognised that *"in specific areas affecting women the changes have been made in a piecemeal and uncoordinated manner"*.⁵¹⁶ More importantly, it acknowledged the existence of *"the problem of constitutional rights being abrogated by negative customary and/or religious laws and practices"*.⁵¹⁷ Therefore, the Platform, *"[i]n line with the Vienna Declaration (para. 38), ... stresses the importance of working towards ... the eradication of any conflicts which may arise between the rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism and armed conflict"*.⁵¹⁸ To this end, the Platform urges the removal of discriminatory and oppressive laws and practices through legislative intervention.

In the above analysis of the regional approach to the status of women, it should not be overlooked that this is a recent development. As seen in Part II, although the African Charter adheres to the principle of non-discrimination in Article 18(3), it also stresses the importance of safeguarding African cultural values and traditions without addressing the question of the possible conflict of the principle of non-discrimination with the principle of equality. Moreover, the Preamble states that the Charter is adopted *"taking into consideration the virtues of their [of African countries] historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights"*. Furthermore, it is declared that *"[t]he promotion and protection of morals and traditional values recognized by the community shall be the duty of the State"*.⁵¹⁹ The emphasis on the need to preserve African cultural identity can also be seen in Article 22 according to which *"all peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind"*.⁵²⁰ Article 18 is the clearest example of the ambiguous approach of the Charter, which, after asserting that *"[t]he State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the women and the child as stipulated in international declarations and conventions"*,⁵²¹ proclaims that *"[t]he state shall have the duty to assist the family which is the custodian of moral and traditional values recognized by the community"*.⁵²² These provisions have the

⁵¹⁶ Para. 55 of the African Platform for Action.

⁵¹⁷ Ibidem.

⁵¹⁸ Para. 106.

⁵¹⁹ Article 17(3).

⁵²⁰ Article 22(1).

⁵²¹ Para. 3.

⁵²² Para. 2.

potential to render the proclamation of non-discrimination against women meaningless. This principle is, indeed, contradicted by the emphasis on “moral and traditional values”, which encompass “values” clashing with the principle of equality. The stress placed on the family further weakens this principle, given the fact that African women suffer from discrimination within the family more than others.⁵²³ However, it should be noted that the Charter acknowledges that “*les valeurs africaines de civilisations n'ont pas toutes la même respectabilité*”.⁵²⁴ Article 29(3) lays down the individual's duty “*to preserve and strengthen the positive African values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion and well-being of society*”. Nevertheless, the definition of “positive” values is completely left open to interpretation. As a result, Khadija Elmadmad has written that the African Charter is characterised by a contradiction between modernism and traditionalism, as well as between universalism and regionalism and that it has placed the rights of women in a “*coma juridique*”.⁵²⁵

The constitutional policy adopted by Zambia mirrors the regional ‘schizophrenia’ vis-à-vis the issue of gender equality. It is not, however, an exception in the framework of constitutions in contemporary Anglophone Africa. Indeed, Zambia's approach to the principle of non-discrimination is also codified in similar terms in the Constitutions of Gambia,⁵²⁶ Sierra Leone,⁵²⁷ Kenya,⁵²⁸ Botswana,⁵²⁹ and Lesotho.⁵³⁰ This similarity derives from the fact that all of the provisions dealing with non-discrimination in these constitutions are a legacy of the constitutional charters left behind by Britain in the sixties. As we have seen in Part I, these were all framed on the same model,⁵³¹ in which, apart from the specific case of the field of taxation,⁵³² sex discrimination was legitimated by both using the

⁵²³ See R.T. Nhlapo, “International Protection of Human Rights and the Family: African Variations on a Common Theme”, in 3 *International Journal of African Law and the Family*, 1989, p. 1.

⁵²⁴ See M'Baye, *Les Droits*, cit., p. 162.

⁵²⁵ K. Elmadmad, “Les droits de la femme dans la Charte africaine des droits de l'homme et des peuples”, in 14 *Afrique* 2000, 1993, p. 26.

⁵²⁶ See Article 25 (4). Gambia does not even include sex as a ground of discrimination.

⁵²⁷ See Article 27 (3).

⁵²⁸ See Article 82 (4). Kenya as well does not even feature sex as a ground of discrimination.

⁵²⁹ See Article 15 (4).

⁵³⁰ See Article 18 (4).

⁵³¹ No exceptions to the principle of non-discrimination are included in the recently adopted Constitutions of Malawi and Uganda, as well in those of Nigeria and Tanzania. The Constitutions of Malawi and Uganda show a strong commitment to the principle of equality between men and women. See Articles 13, 20, 22, 24 and 30 of the Constitution of Malawi and Articles. XV, XXIV, 21, 33 of the Ugandan Constitution. This does not mean that women enjoy equality with men in these countries. Political, social, economic and cultural obstacles still exist. The recognition of sharia law in the 1999 Nigerian constitution, however, raises serious questions regarding the extent to which Muslim Nigerian women can actually enjoy of the right to equality.

⁵³² Article 23 of the Zambian Constitution provides constitutional legitimacy to the Income Tax Law (Chapter

public/private distinction and by relying on the pluralistic character of Zambian legal system.⁵³³

In order to analyse the possible derogations based on the public/private dichotomy and to understand the concrete impact of the exclusion of the "private" from the scope of application of the principle of non-discrimination on women, an examination of women's position under statutory law is needed. In this regard, it should be recognised that, with regard to personal law, much of Zambian legislation grants women a position of equality with men. Unlike customary law, the Marriage Act⁵³⁴ provides that marriage can be only monogamous and the spouses have equal right to demand divorce in the case of adultery. Moreover, in the case of divorce, wives have the right to maintenance and custody of the children. Married women continue to autonomously acquire, hold and dispose property.⁵³⁵ Women also have the right to a share in the matrimonial property which encompasses the husband's property, the property created jointly or with the contribution of either spouse. This gives courts a wide power in the distribution of the matrimonial property in the case of divorce including the power to give one spouse the property of the other.⁵³⁶ However, it should be examined to what extent these provisions are applied by the judges "most of whom are Black Zambian men, themselves subject to customary law in many respects"; to what extent the courts' orders for the division of property upon divorce are enforced and to what extent women are adequately

668 of Zambian Laws). This law discriminates against married women by not recognising their autonomous income in order to determine their tax liability; see section 19(2) of the law. The rate of tax to be applied to women's income is the same as that of the husband. Furthermore, before the reform of 1987, women were denied any personal allowance in the form of marriage and child allowances, which under Zambian law, are set off against married persons before the assessment of tax. The reason for this provision rested on the fact that only subjects with a formal income are entitled to these allowances and, as stated above, only the husband has an income for taxation. Following the reform, the allowance is now equally distributed between the two spouses, unless one can demonstrate that the other does not earn any income. In this case, he or she is entitled to 60 percent of the marriage allowance. See Income Tax (Amendment) Act (No. 14 of 1987), section 17.

⁵³³ Legal pluralism is a typical feature of African legal systems. It consists of the co-existence between European legal systems with African customary law. In the field of legal pluralism, the studies of Vanderlinden have been fundamental. He has defined legal pluralism as "*l'existence, au sein d'une société déterminée, de mécanismes juridiques différents s'appliquant à des situations identiques*"; see J. Vanderlinden, "*Le pluralisme juridique. Essai de synthèse*", in J. Gillissen (cur.), *Le pluralisme*, Bruxelles, 1971, p. 19. While Vanderlinden has viewed legal pluralism in terms of mechanisms of conflict resolution, other authors have subsequently given a definition in terms of co-existence of different legal orders; see J. Griffiths, "What is Legal Pluralism", 24 *Journal of Legal Pluralism*, 1986, p. 1 and G.R. Woodman, "Legal Pluralism and the Search for Justice", 2 *Journal of African Law*, 1996, p. 152. For other studies on the subject see M.P. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Law*, Clarendon Press, Oxford, 1978; M.P. Galanter, "Justice in Many Rooms", in 19 *Journal of Legal Pluralism*, 1981, p. 1; E. Grande (ed.), *Transplants, Innovation and Legal Tradition in the Horn of Africa*, L'Harmattan-Italia, Torino, 1995.

⁵³⁴ Chapter 211 of Zambian Laws.

⁵³⁵ In this regard, see section 5 of the Law Reform (Miscellaneous Provisions) Act (Chapter 74 of Zambian Laws) according to which a married woman is "*capable of acquiring, holding and disposing of any property ... in all respect as she were a feme sole*".

⁵³⁶ See P.M. Bromley, *Family Law*, Butterworths, London, 1981, pp. 523-570.

advised and represented.⁵³⁷ Furthermore, with reference to inheritance, widows are entitled to inherit from the husband's intestate estate under statutory law and unlike customary law. With regard to inheritance, English law, which is mainly entrenched in the Statutes of Distribution (1670-85) is applied and widows are also entitled to the husband's benefits and rights to compensation.⁵³⁸ A discriminatory provision is, however, included in the Immigration and Deportation Act⁵³⁹ under which a married woman acquires the domicile of the husband.

Apart from personal law, discriminatory provisions still exist especially against married women. Among the most challenged, these concern citizenship, which is a matter regulated by both the Constitution⁵⁴⁰ and the Citizenship Act.⁵⁴¹ Before the amendments of 1996, the Zambian Constitution provided that foreign women married to Zambian men were only entitled to citizenship by registration, after a continuous three-year residence. Conversely, the ordinary procedure for obtaining citizenship by registration was applied to foreign men married to Zambian women.⁵⁴² After the 1996 amendments, foreign women are also covered by the ordinary system. A continuing discriminatory provision lays down that children born in Zambia to persons who are not citizens acquire Zambian citizenship only if their fathers were legally resident in Zambia at the time of their birth.

Another example of discrimination is the limitation on women's freedom of movement outside Zambia. Unmarried women below the age of twenty-one must have the consent of the father to be put on their mother's passport, or to obtain their own passport. Furthermore, a woman who has the legal custody of her child must obtain a court order to give her consent to her child to receive their passport.⁵⁴³ The opposition of Zambian women to this practice is demonstrated by the fact that even on occasion of the consultations for the

⁵³⁷ See C.N. Himonga, K.A. Turner, C. Beyani, "An Outline of the Legal Status of Women in Zambia", in J. Stewart and A. Armstrong (eds.), *The Legal Situation of Women in Southern Africa*, Women and Law in Southern Africa, Vol. II, University of Zimbabwe Publications, Harare, p. 159.

⁵³⁸ In this area among the English acts, the National Provident Fund Act, 1970, the Workmen's Compensation Act, 1977 and the Superannuation and Life Assurance Schemes Act, 1978 are applied.

⁵³⁹ Chapter 122 of the Laws of Zambia.

⁵⁴⁰ Article 6.

⁵⁴¹ Chapter 121 of the Laws of Zambia.

⁵⁴² This is subordinated to ten years of continuous residence.

⁵⁴³ See Form A, Application for a Passport. In 1990, when pressure for a new constitution had already started, a protective ruling was given in the case *Nawakwi v Attorney General* 1990/HP/1724. This case dealt with the constitutionality of the administrative procedures of the passport office which required that children could be put on the mother's passport only with their father's consent while the mother's consent was not required for the children to be on the father's passport. The court found that this practise was in violation of Article 25(2) of the 1973 Constitution which stated that " ... no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority". The court judged the passport office and these administrative regulations to be discriminatory.

1996 constitutional amendments, this practice was challenged by a number of petitioners as discriminatory.⁵⁴⁴

This overview of statutory discriminatory provisions is incomplete without taking into account a field where women traditionally enjoy a disadvantaged status compared to that of men, in other words, the workplace. In this respect, Zambian legislation⁵⁴⁵ has been amended since 1991 to guarantee equality of treatment between men and women workers. In 1991, the Employment of Women, Young Persons and Children's Act⁵⁴⁶ was amended and all of the restrictions on the employment of women were repealed.⁵⁴⁷ With regard to wages, the Employment Act incorporated the ILO Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value of 1951 (No. 100). With regard to pregnancy, as a result of the 1982 amendment, Zambian women are protected against dismissal. However, the Employment Act provides for paid maternity leave for twelve weeks every two years, and only when the woman has worked for the same employer for at least two years. Conversely, the ILO Maternity Protection Convention of 2000 (No. 183) provides for a period of maternity leave of not less than fourteen weeks without any conditions linked to the length of employment. A gender biased application of neutrally formulated provisions concerning the conditions of service has also created a discriminatory conduct in relation to an employee's entitlement to receive housing or housing allowances from their employers. The Employment Act obliged employers to either house or to pay a housing allowance to their employees who earn less than Kwacha 40 per month.⁵⁴⁸ While the Act did not contain any reference to whether this right would be vested upon women or men, the subsidiary Regulation 87(2) envisages that employers are not obliged to provide for housing for married women living with husbands who have an adequate house, or are receiving a house allowance. This created a discriminatory situation, which is even more serious for separated, but not yet divorced, women who need their husband's consent to receive housing or an allowance from their employers.

Within the exceptions to the principle of non-discrimination, the most complex relates

⁵⁴⁴ See Report of the Constitutional Review Commission, cit., p. 42.

⁵⁴⁵ The basic statute on the matter is the Employment Act (Chapter 512 of Zambian Laws). Other statutes relating to employment include the Industrial Relations Act (Chapter 517 of Zambian Laws), Minimum Wages and Conditions of Employment Act (Chapter 509 of Zambian Laws) and Zambia National Provident Fund Act (Chapter 513 of Zambian Laws).

⁵⁴⁶ Chapter 505 of Zambian Laws.

⁵⁴⁷ Before this amendment, the law prohibited the employment of women in industrial undertakings during the night, except in the case of a family undertaking or unless some specific conditions were present, where women were not engaged in physical labour or only for a limited period.

⁵⁴⁸ See the Employment Act, sections 41(1) and (2), and the Employment Regulations No. 7(i).

to the application of customary law. This term⁵⁴⁹ is used to define “the system of norms which governs the lives of millions of African people, particularly (but not exclusively) those in rural areas. It is a custom-based system and its legitimacy lies largely in its claim to a direct link with the past and with tradition”.⁵⁵⁰ The deep entrenchment of customary law in the social fabric of sub-Saharan Africa is independent from its formal, constitutional or statutory recognition.⁵⁵¹ Its application is one of the most sensitive issues when dealing with human rights in Africa due to the fact that many customary norms and practices are not compatible with individual fundamental rights and freedoms, especially those of women. Under customary law, women tend to be accorded the status of perpetual minor subject to the authority and guardianship of their father and then of their husband. The constitutional recognition of customary law along with the inclusion of bills of rights clearly highlights this incompatibility. This question concerns not only Zambia, as in Anglophone Africa, the priority of individual fundamental rights and freedoms over customary law is only laid down in the constitutions of Malawi and Uganda.⁵⁵²

This issue can be framed in two different manners. Firstly, it can be presented as a

⁵⁴⁹ Some authors prefer to refer either to traditional or indigenous law.

⁵⁵⁰ T. Nhlapo, “Indigenous Law and Gender in South Africa: Taking Human Rights and Cultural Diversity Seriously”, in *Third World Legal Studies* 1994-95, p. 53.

⁵⁵¹ In fact, not all of the countries in English-speaking Africa have expressly recognised customary law in their constitutions. In the case of Ghana, Malawi, Nigeria and Uganda the recognition of customary law can be merely determined indirectly from the acknowledgment of the right to culture. In Article 26 of the Ghanaian Constitution: “Every person is entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion subject to the provisions of this Constitution”. In Article 26 of the Constitution of Malawi: “Every person shall have the right to use the language and to participate in the cultural life of his or her choice”. In Article 21 of the Constitution of Nigeria: “The State shall protect, preserve and promote the Nigerian cultures which enhance human dignity and are consistent with the fundamental objectives as provided in this Chapter”. In Article 37 of the Constitution of Uganda: “Every person has a right as applicable, to belong to, enjoy, practise, profess, maintain and promote any culture, cultural institutions, language, tradition, creed or religion in community with others”.

⁵⁵² The Constitution of Malawi establishes in Article 22 that “[a]ll men and women have the right to marry and found a family” (para. 3); and that the disposal according to which “[n]o person shall be forced to enter into marriage” (para. 4) regardless of whether it is a marriage “at law, custom and marriages by repute or by permanent cohabitation” (para. 5). Moreover, Article 26 (2) states that “... legislation shall be passed to eliminate customs and practices that discriminate against women, particularly practices such as – (a) sexual abuse, harassment and violence; (b) discrimination in work, business and public affairs; and (c) deprivation of property”. The Ugandan Constitution proclaims in Article 33(6) that “[l]aws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by this Constitution”. The Ghanaian and the Nigerian Constitutions also contain provisions limiting the scope of applicability of customary law, although they are formulated in much broader terms. See Article 26 of the Ghanaian Constitution: “All customary practices which dehumanise or are injurious to the physical and mental well-being of a person are prohibited”. See Article 21 of the Nigerian Constitution, also *supra* ft. 202: “The State shall protect, preserve and promote the Nigerian cultures which enhance human dignity and are consistent with the fundamental objectives as provided in this Chapter” (this includes the prohibition of discrimination on the ground of sex, see Article 16(2)). The Constitution of Tanzania is silent on this issue. Section 5(1) of the Constitutional (Consequential, Transitional and Temporary Provisions) Act of 1984 vests in the courts the power, from March 1988, to apply the law including customary law “with such modifications, adoptions, qualifications, and exceptions as may be necessary to bring it in conformity with the provisions of the Bill of Rights”.

conflict between two modalities of perceiving the relationship between the individual and society, i.e. the communitarian view underlying African (legal) culture and the Western individualistic philosophy underlying Bills of Rights. In addition, the question can also be addressed within the framework of the human rights discourse by viewing it as a clash between rights: the collective right to culture and the rights of the individual. The constitutional acknowledgement of the specificities of African own culture and legal tradition can, indeed, be perceived in terms of the exercise of the right to culture,⁵⁵³ which is included in the International Bill of Rights.⁵⁵⁴ However, this interpretation is not unproblematic. On the

⁵⁵³ See L. Berat, "The Future of Customary Law in Namibia: A Call for An Integration Model", in 15 *Hastings International and Comparative Law Review*, 1991 (Lexis-Nexis).

⁵⁵⁴ See Article 15 of the ICESCR: "The States parties to the present Covenant recognize the right of everyone: (a) to take part in cultural life". See also the Universal Declaration, Article 27: "Everyone has the right freely to participate in the cultural life of the community...". In reality, the right to culture proclaimed by the ICESCR has mainly been interpreted by referring either to Article 27 of the ICCPR which refers to the right to culture with specific reference to minorities ("[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture ...") or to Article 2(1) of the ICCPR, with reference to the principle of non-discrimination or, finally, with reference to certain rights such as freedoms of expression, religion, and association and the right to "take part in the conduct of public affairs"; see Steiner and Alston, *International*, cit., p. 264. The interpretation of the right to culture as encompassing the right to apply customary law has been mainly discussed in relation to minorities or indigenous peoples; see also UN, Economic and Social Council, Report of the Second (Social) Committee, 2, 11-12, UN Doc. E/1982/59 (1982) (Adopting Report of Sub-Commission on Prevention of Discrimination and Protection of Minorities, authorising the Sub-Commission to establish a working group on indigenous population) as well as the 1992 UN Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities and the ILO Conventions No. 107 (Concerning the Protection and Integration of Indigenous and Other Tribal and semi-Tribal Populations in Independent Countries, 1957) and No. 169 (Concerning Indigenous and Tribal Peoples in Independent Countries, 1989). Both of these Conventions mention the right of indigenous population to maintain their customary laws. However, as M. Venter has remarked with regard to Article 27 of the ICCPR, "[i]t seems inconceivable that a state can have obligations toward its minorities that it does not have toward its entire population. In this context, customary law appears to be a part of a people's culture"; see M. Venter, "Customary Law in a New South Africa: A Proposal", in 15 *Fordham International Law Journal*, 1991-1992, p. 96. The importance of safeguarding culture has been emphasised also by the UN General Assembly, which urged government in 1973 "to make cultural values, both material and spiritual, an integral part of development efforts". Furthermore, a series of conferences organised under the auspices of UNESCO not only stressed the relevance of culture but also of customary law as integral part of a people's culture. In 1965, the UNESCO Seminar on Multinational Society urged the "recognition of the importance of maintaining permissible legal traditions in fields such as laws of succession, marriage, dietary law, ..."; see UN Doc. ST/TAO/HR/23 (1965). On the necessity to preserve cultural identity, see the Declaration of Principles of International Co-operation adopted in 1966 by General Conference of UNESCO. In 1970, the Intergovernmental Conference on Institutional, Administrative and Financial Aspects of Cultural Policies emphasised that governments are responsible for financing and planning cultural institutions and programs; see UN Doc. SHC/MD/13 (1970), para. 51. In 1972, the Intergovernmental Conference on Cultural Policies in Europe stated that governments and the international community have a duty to ensure the participation of everyone in the "cultural life of his community". In 1974, a seminar on the promotion and protection of the human rights of national, ethnic, and other minorities proclaimed "the responsibility of the authorities to guarantee in law and in practice the maintenance and preservation of such traditions and customs and to provide for their autonomous development, where necessary by public financing"; see UN Doc. ST/TAO/HR/49, paras. 10-13 (1974). In 1975, the Intergovernmental Conference on Cultural Policies in Africa organised jointly by UNESCO and the OUA at Accra declared at para. 32 and 33 that: "The assertion of cultural identity was considered to be an act of liberation, a weapon in the fight for effective independence and the best means of achieving the self-fulfilment of individuals and the harmonious development of societies. It was, moreover, the first pre-requisite for the advent of a new world order, based on the inalienable right of nations to dispose of themselves and on

one hand, the safeguarding of customary law can be seen as instrumental for the preservation of African cultural values,⁵⁵⁵ whilst, on the other hand, it could be challenged as also being instrumental for the maintenance a situation of inequality in the enjoyment of rights between men and women. Therefore, as Venter has highlighted, “[t]he challenge confronting the legislator and the judiciary ... is reconciling the apparently conflicting, but arguably equally valid, legal premises”,⁵⁵⁶ that is women’s human rights⁵⁵⁷ and cultural rights. Moreover, it could be argued that a critical approach should be taken when linking customary norms with culture. The customary law which is referred to concerns the customary law as it was codified by the colonial administrators,⁵⁵⁸ with the collaboration of the indigenous élite composed of traditional authorities and the heads of families. Women, together with young men, were excluded from this process,⁵⁵⁹ and as a consequence, they could not present their views on what constituted customary law. The male élite obviously emphasised the patriarchal features of African traditions. It was not only the processes that were traditionally subject to negotiations and compromises which were crystallised according to the views put forward by men, but new traditions were also “imagined into existence” if necessary by the colonial

recognition of the absolute equality and dignity of all cultures. However, the assertion of cultural identity presupposed resolution and deliberate action to remove the element of alienation inherent in forms of thought and action which were foreign to African reality, and the abandonment of undue susceptibility to outside influences which still too often characterised certain kinds of behaviour. There could be no genuine independence without cultural decolonisation”. In 1976, the General Conference of UNESCO held in Nairobi (nineteenth session) adopted a Recommendation on the Participation by the People at Large in Cultural Life and their Contribution, in which it recommended that states should guarantee cultural rights and equality of cultures.

⁵⁵⁵ W. Benedek, “The Role of International Law in the Protection and Promotion of Human Rights of Women in Africa”, in 49 *Austrian Journal of Public and International Law*, 1995, p. 274.

⁵⁵⁶ C.M. Venter, “The New South African Constitution: Facing the Challenges of Women’s Rights and Cultural Rights in Post-Apartheid South Africa”, in 21 *Journal of Legislation*, 1995 (Lexis-Nexis). The author specifically refers here to South Africa, but her argument can be extended to the whole Sub-Saharan Africa.

⁵⁵⁷ In this thesis, the expression “women’s human rights” is used instead of “women’s rights” in order to make reference to the impact of customary law on fundamental rights which women have as human beings and not as women. With the expression women’s rights, scholars usually refer to rights specifically belonging to women; see H. Charlesworth, “What are “Women’s International Human Rights?”, in R. Cook (ed.), *Human Rights of Women: National and International Perspectives*, University of Pennsylvania Press, Philadelphia, 1994, ft. 4, p. 77. For a critique of the category of “women’s rights” as construed on “motherhood” rather than “womanhood”, see K. Tomasevski (ed.), *Women and Human Rights*, Zed Books, London and New Jersey, 1993, p. ix.

⁵⁵⁸ This work of codification was carried out by using oral evidence of colonial officials and elders of the various ethnic groups as well as texts written by court officials, missionaries and anthropologists.

⁵⁵⁹ This collaboration was very useful for both actors. Tribal authorities and the heads of families needed the weight of state power in order to strengthen their position and to avoid that “the practices of young men and women, of divorcees and widows, all of whom struggled against aspects of the maintained patriarchy, would be clearly visible as custom”; see M. Chanock, “State, Law and Culture: Thinking about ‘Customary Law’ after Apartheid”, in *Acta Juridica*, 1991, p. 55. At the same time, the British needed strong indigenous local authorities for the system of indirect rule which they established in the colonies. To this end, colonial authorities used customary law as a means to enhance existing indigenous authorities or even invented “traditional” authorities; see M. Chanock, “The Law Market: British East and Central Africa”, in W.J. Mommsen and J.A. De Moor (eds.), *European Expansion and Law. The Encounter of European and Indigenous Law in 19th and 20th Century Africa and Asia*, Berg, Oxford/New York, 1992, p. 279 et seq.

power.⁵⁶⁰ Further, the interpretation given by European colonisers of African customs was carried out using European classifications, which contributed to the distortion of traditional customs. The official recognition of customary law, accompanied by the statutory establishment of special courts (called the Native Courts) also provoked changes in the nature of customary law. The “dynamism” and “adaptability” of African customs to social change was corrupted by this process of “positivisation” and “judicialisation”. In other words, the flexible African customs turned into rigid rules.⁵⁶¹ Consequently, customary law was prevented from evolving and adapting to new socio-economic conditions, and possibly also to women’s status. In considering this background, the assumption that the preservation of customary law would protect African culture needs to be qualified as this protection only refers to the concept of African culture that was interpreted by a small section of African society and transformed in its nature by the European colonial powers. Moreover, in the sphere of the pure human rights discourse, it is incomplete to view the conflict between customary law and individual rights and freedoms in such dualistic terms: collective rights *versus* individual rights. Indeed, the clash is also internal to the category of collective rights. Women’s claims are also grounded on the right to development, which as Benedek has stressed, “calls for an advancement, if not liberation of women, elimination of all forms of discriminatory traditions and practices, equal participation in public life, equal access to education facilities and health services, equality with regard to property rights and civil status”.⁵⁶²

A critical approach should also be taken in relation to the other way of presenting the conflicting relationship between customary law and women’s human rights, that is communitarianism *versus* individualism. The classic portrayal of customary law as communitarian should, in fact, be seen in a broader perspective by taking into account that although rights relate to groups in traditional African culture, the actual exercise of some of these rights is vested in certain individuals acting on behalf of the group. Gender is a determinant factor in singling out the representatives of the community, as they usually are the men, who are at the head of the agnatic group.

Borrowing from Elmadmad’s image, it could be argued that the Zambian Constitution

⁵⁶⁰ See T. Ranger, “The Invention of Tradition in Colonial Africa”, in Hobsbawm and Ranger, *The Invention of Tradition*, cit., p. 211 et seq. and Chanock, *Law*, cit., p. 80.

⁵⁶¹ On this process, see I. Currie, “The Future of Customary Law: Lessons from the Lobolo Debate”, *Acta Juridica*, 1994, p. 146; M. Chanock, *State, Law and Culture*, cit., p. 55 and with specific reference to Zambia, see M. Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia*, Cambridge University Press, Cambridge, 1985.

⁵⁶² Benedek, *The Role*, cit., p. 274.

has placed women's human rights in a situation of "legal death". An examination of the condition of women under the Zambian customary law will provide concrete evidence of the detrimental impact of the Zambian constitutional approach on women's human rights. By extension, these reflections can also be applied to constitutions which do not expressly give priority to individual human rights over customary law.

The application of Zambian customary law is regulated by section 16 of the Subordinate Courts Act⁵⁶³ and, also implicitly, by the Local Courts Act,⁵⁶⁴ which have introduced a dual legal system in Zambia. The scope of application of the dual system is confined to personal law, including marriage, land rights, succession and inheritance. In more concrete terms, Zambians are, therefore, entitled to choose whether they wish to get married under customary law or the Marriage Act. This choice also determines the law that will regulate matters of matrimonial relief and property. Succession and inheritance are governed by customary law⁵⁶⁵ if the person is a Zambian citizen who dies intestate,⁵⁶⁶ or by statutory law in case of a testate death.⁵⁶⁷ The dual legal system corresponds with a dual judicial system, consisting of a parallel structure of courts, namely one which applies statutory law and another (the Local Courts), which applies customary law.⁵⁶⁸ Studies covering the period 1960-1980 have shown that Zambians still prefer to make recourse to customary law,⁵⁶⁹ and

⁵⁶³ Chapter 45 of the Laws of Zambia. This Chapter recognises the applicability of customary law provided that this is "*not repugnant to justice, equity or good conscience and is not incompatible, either in terms or by necessary implications with any written law in force in Zambia*". This is known as "repugnancy clause" and it dates back to colonial times. The application of customary law was subordinated to its conformity with European morality.

⁵⁶⁴ Chapter 54 of the Laws of Zambia. Section 12(1) provides that African customary law shall apply to any matter before Local Courts in so far as such law is "*not repugnant to natural justice or morality or incompatible with provisions of any written law*".

⁵⁶⁵ See Subordinate Courts Act (Chapter 45 of Zambian Laws). In case of a marriage contracted under the Marriage Act, it is uncertain whether customary law or statutory law should be applied; see C.N. Himonga, "Property Dispute in Law and Practice: Dissolution of Marriage in Zambia", in A. Armstrong and W. Cube (eds.), *Women and Law in Southern Africa*, Publishing House, Harare, 1987, pp. 56-84 quoted in Himonga, Turner, Beyani, an Outline, cit., p. 140.

⁵⁶⁶ The majority of customary laws existing in Zambia follow the matrilineal system.

⁵⁶⁷ The Wills and Administration of Testate Estates Act of 1989 applies to testate succession. It is based on English law. Prior to its enactment, the English Will Act of 1837 was applied.

⁵⁶⁸ See Local Court Act of 1966 (s. 56(1)). Local Courts have replaced the Native Courts established by the British in Northern Rhodesia with the task of applying customary law to disputes among Africans in the field of personal law. Appeals against the decisions of the Local Courts could be presented to the magistrates courts. Every court is composed of three justices. These are appointed by the Judicial Service Commission from a list of candidates recommended by the local chief and generally on advice of the Provincial Local Courts Officer. There is no specific qualification required apart from the knowledge of the local customary law. The proceedings before the Local Courts are informal; see E.L. Hoover, J.C. Piper and J.O. Spalding, "One Nation, One Judiciary"; the Lower Courts of Zambia", in *Zambia Law Journal*, 1970.

⁵⁶⁹ Africa Network for Human Rights and Development (AFRONET) has defined Local Courts as the "busiest courts in Zambia". In 1998, they heard between 30 and 50 cases each day; see AFRONET, *The Dilemma of Local Courts in Zambia*, 1998,

in the case of litigation, to apply to the Local Courts.⁵⁷⁰ The vitality of customary law confirms that the issue of the contrast between women's human rights as recognised in the Constitution and customary law is a crucial and unavoidable question.

By starting the overview of Zambian customary law from the institution of marriage, it is immediately clear that the status of women is considered to be that of a perpetual minor. Upon, during, and at the dissolution of marriage, women do not have any right of individual self-determination. Their marriages depend upon the consent of their relatives. The need for their consent is strengthened by the fact that for the marriage to take place, the women's parents have to receive and, therefore, previously accept a payment known as the lobolo from the future husband. This payment also makes divorce subordinate to the consent of the women's relatives as, in most tribes, the lobolo has to be paid back in the case of divorce and, consequently, if a woman seeks a divorce, she needs the agreement of her parents to give back the lobolo. A further aspect which distinguishes the status of women and man is the fact that customary marriages may be polygamous. Moreover, while the husband is allowed to bring action for damages against a man who commits adultery to his wife, the same right is not recognised for the wife.⁵⁷¹ In case of dissolution of the marriage, customary law does not provide women with any form of maintenance.⁵⁷² The wife is only entitled to receive maintenance from her husband's relatives upon his deaths provided that she accepts to be "inherited" by them. Regarding the custody of the children, two different situations may arise.⁵⁷³ In the matrilineal societies where children belong to the mother's kinship group, the children will be given to the mother, while in the patrilineal society they will be given to the father, provided that the lobolo had been repaid, (if this was required under the customary law of the tribes involved).⁵⁷⁴ In the tribes where the payment of the lobolo is not contemplated,

at http://www.oneworld.org/afronet/reports/1_courts.htm Coldham reports that from 1963, when the possibility to get married under the Marriage Act was introduced, until the end of 1983, only a small number of couples married under the Marriage Act, as the majority preferred to contract customary marriage; see S. Coldham, "Customary Marriage and the Urban Local Courts in Zambia", 34 *Journal of African Law*, 1990, p. 69. A demonstration of the attachment of rural Zambians to customary law can be seen in the 1982 Report on the Reform of the customary succession presented by the Law Development Commission, which was charged with the task of formulating a draft reform in 1974. According to the Report "the majority of the people in the rural areas stated categorically that they were happy with their customs and saw nothing wrong with them", see *Report on the Law of Succession*, Government Printer, Lusaka, 1982, p. 1, quoted in S. Coldham, "The Law of Succession in Zambia, Recent Proposals for Reform", in 27 *Journal of African Law*, 1983, p. 164.

⁵⁷⁰ See Coldham, Customary Marriage, cit., pp. 67-75. He quotes figures from the Office of the Local Court Adviser dating back to 1982. Moreover, he reports that appeals were rare; see *ibidem* ft. 3 and 4.

⁵⁷¹ For the regime under the Marriage Act see *ibidem*, pp. 149-151.

⁵⁷² See *Mwiya v. Mwiya* (1977) LR 113.

⁵⁷³ The issue of 'legal' custody, which gives the parent a set of rights, powers and duties over minor children, is now discussed. The 'actual' custody may in fact be given to the mother even when she does not have legal custody.

⁵⁷⁴ For example, this was the case with the tribes of the Tonga, Ngoni and the Lozi.

the children are given to the mother.⁵⁷⁵

With regard to property rights, unmarried women can acquire, dispose and hold property under customary law. Upon marriage, they retain the property acquired before marriage and continue to have rights to property obtained by gift or succession in her relatives' estate as well as to income derived from work traditionally carried out by women.⁵⁷⁶ However, it remains uncertain whether they are entitled to keep their income from employment outside the household.⁵⁷⁷ Some scholars argue that women have the right to keep what they earn, and others, conversely, argue that when the lobolo has been paid, husbands obtain the property of their wives' labour power. This interpretation seems to be supported by courts, which have, in fact, stressed that wives are required to contribute to the household in the form of work.⁵⁷⁸ Upon divorce, women can only keep their own property, but not what they may have contributed to through their work.

The position of women is also weaker in relation to succession and inheritance upon marriage. Before getting married, women have the right to inherit from their fathers or maternal relatives depending on whether they belong to a patrilineal or matrilineal tribe.⁵⁷⁹ However, they are not entitled to inherit from their husbands, not even with respect to the property that they have contributed to. Once married, women do not become members of the husband's line of descent, but remain part of their birth kin. However, according to some studies dating back to the 1970s, some moves have been made towards recognising the right to inherit of women from the deceased husband, particularly when there are young children involved.⁵⁸⁰ Given the manifest unfairness of this custom, after much lobbying by the women's movements, the legislator intervened with the Intestate Succession Act in 1989,⁵⁸¹ in order to provide the widow and the children with some form of protection.⁵⁸² However, the

⁵⁷⁵ For example, the tribes of the Bemba, Luvale, Chewa and Nsenga.

⁵⁷⁶ Upon marriage, the spouses do not form a property-holding unity.

⁵⁷⁷ This is a relatively new phenomenon, as traditionally Zambian women only worked within and for the household. Studies on these issues either date back to the 1950s and 1960s or concern urban areas only. Therefore, there is no unequivocal answer; see Himonga, Turner, Beyani, *An Outline*, cit., p. 157.

⁵⁷⁸ See Himonga, *Family*, cit., p. 250-251.

⁵⁷⁹ On the different forms of succession in Zambia, see Allot et al., in M. Gluckman (ed.), *Ideas and Procedures in African Customary Law*, Oxford University Press, Oxford, 1969, pp. 57-58.

⁵⁸⁰ See M.P. Mvunga, "Law and Change: A Case Study in the Customary Law of Inheritance in Zambia", in 28 *Africa Social Research*, 1979, pp. 643-54.

⁵⁸¹ No. 5 of 1989. Proposals for reform of the customary law of succession have actually been presented since the early 1970s. The Parliament, nevertheless, has never proved to be particularly concerned about the impact of customary law on women. On the difficulties encountered by the reform to be approved, see M.M. Munalula, "Law as an Instrument of Social Change: The Constitution and Sexual Discrimination in Zambia", in 1 *International Journal of Discrimination and the Law*, 1995, p. 142.

⁵⁸² This Act has replaced all laws on intestate inheritance and succession except for family and chieftainship property and land held under traditional tenure. It regulates intestate succession, therefore, it also includes customary succession and provides that children of the deceased man equally share 50 percent of the estate; the

law does not provide a sufficient means to grant women a share of the estate. "Property grabbing"⁵⁸³ by the deceased's relatives is frequent, also due to the support of Local Courts as well as to a widespread ignorance of the law.⁵⁸⁴ Moreover, the Intestate Act is not a real disincentive, as the fines for property grabbing are extremely low.

In analysing Zambian customary law, there are clear signs that the status of women is changing. Apart from legislative measures such as the Intestate Succession Act, there have been decisions by Local Courts which have interpreted customary norms in order to grant women some form of protection. Local Courts have been particularly progressive with regard to cases of divorce. In this field, urban Local Courts have granted divorce to women even in the absence of the agreement of their parents. Some Local Courts have even allowed women the right to compensation in urban areas.⁵⁸⁵ The reasons given by the courts for granting compensation is of great significance. Local Courts have grounded their decisions in the need to protect wives in the case of a divorce initiated by husbands without good cause. Furthermore, they have indicated that they are motivated by the necessity of providing women with the essential means for living considering that they had been dependent on the husbands during the marriage. Finally, the courts have pointed to the fairness of compensating women for the services that they provided to their husbands. However, this tendency has not become the rule. Resistance is visible even at the level of urban Local Courts, and above all, in the Subordinate Courts which decide on the appeals. Subordinate Courts have tended to quash decisions granting compensation on the basis that this is not provided for by customary law.

In addition, in relation to the issue of the custody of the children, Local Courts have adopted a flexible approach in the application of customary law. Claims for child custody are, thus, not decided in conformity with customary law, but on the basis of the best interest of the child. In the light of this principle, Local Courts tend to give custody to the mother, taking customary law into account, the parties' conduct and the person who is currently taking care of the children. The position of the Subordinate Courts in the case of an appeal is clearer as

widow is entitled to 20 percent; the parents 20 percent; other relatives 10 percent. According to the 1996 reform of the Act, the 20 percent which is granted to the widow must be shared with any other woman who can prove a marital relationship with the deceased man.

⁵⁸³ This expression defines the appropriation of all of the household property by the deceased's heir(s). Property grabbing is not a custom in itself. It is a distortion of the customary practice according to which the widow was also 'inherited' and, as a consequence, she was maintained by the heirs of the husband.

⁵⁸⁴ See 1994 Report on the Law of Inheritance in Zambia, quoted in Munalula, Law, cit., ft. 22.

⁵⁸⁵ See C.N. Himonga, *Family Property Disputes: The Predicament of Women and Children in a Zambian Urban Community*, Univ. of London, London, Ph.D. thesis, 1985, p. 286, quoted in Himonga, Turner, Beyani, an Outline, cit., p. 151.

they tend to grant custody to the mother if the children are under six or seven years and to the father if they are above this age. Unlike the Local Courts, the Subordinate Courts take the decisions without taking customary law into account and without regard to the parents' responsibility in the dissolution of the marriage as they believe that the father would satisfy the needs of elder children better. The High Court has also given custody to the mother on the basis of the principle of the best interest of the child. Regarding High Court's decisions, it should be noted that although they are binding lower courts do not necessarily follow them. Furthermore, only a few cases are appealed before the High Court. Therefore, High Court's position is not crucial in the development of customary norms as applied by the judiciary.

With reference to property rights, in urban areas the Local Courts have begun pursuing an approach which promotes and safeguards women's rights. Considering the relevance of the wives' contribution in terms of property and income, some courts have acknowledged joint ownership of property acquired upon marriage and ruled on the division of property upon divorce.⁵⁸⁶ Regarding succession, even before the adoption of the Succession Act, the customary regime was mitigated by decisions taken by Local Courts, which had even put the intestate estates of Africans under the administration of the Administrator-General, who is responsible for administering the estates of testate or intestate persons. These decisions have been taken either when the court does not have the power to decide (e.g. leasehold land), or when the family of the deceased cannot reach agreement on the appointment of an administrator.⁵⁸⁷ Despite these developments, the courts continue to apply customary law without considering the hardship caused to women. The problem of the infringement of women's human rights still exist because not all of the disputes are brought before the Local Courts. In certain cases, traditional dispute settlements⁵⁸⁸ are preferred. As Munalula has observed with regard to the Zambian situation, "in a pluralist legal system, law has a very limited place in regulating social relations and developments. Law reformists need to recognise this limitation in order to maximise the benefits of law reform and take measures

⁵⁸⁶ See Himonga, *Property Disputes*, cit., pp. 62-63.

⁵⁸⁷ When this occurs, the Administrator General does not distribute the land according to customary norms, but rather according to the principles established by the Minister of Legal Affairs which are included in a department circular, see Letter from the Minister of Legal Affairs to the Administrator-General of 14th February 1984. This attributes 50 percent of the deceased's estate to the children, 20 percent to the widow, 20 percent to the parents and 10 percent to the other relatives, see Coldham, *The Law of Succession*, cit., p. 163.

⁵⁸⁸ Senior relatives of the parties to the marriage, the family 'council' or traditional village headmen, may constitute these informal forums, which apply customary law. These traditional institutions for dispute settlement are recognised by the Local Court Act, s. 50(1); see C. Himonga, "The Dual Family Law System in Zambia: Co-Existence and Operation", in *Law and Anthropology*, Nijhoff, Dordrecht, 1994, p. 245.

which will target structural social change".⁵⁸⁹

Moreover, it has only been the Local Courts in urban areas which have adopted these types of decisions. The situation in rural areas and small towns is still extremely serious for women, to the extent that "[t]here is also some evidence that many customary-law wives whose marriages end in divorce face destitution".⁵⁹⁰ In this regard, it should be highlighted that the social and economic structure in which customary law evolved has also changed and the rationale behind certain institutions is no longer valid. For example, the traditional exclusion of widows from inheritance and the passing of the estate to the senior male descendants derived from the need not to divide the estate. The disappearance of the extended family and the arrival of the nuclear family structure in sub-Saharan Africa have eroded the value of this custom. Furthermore, within traditional African social organisation, women had a subordinate status, but were inserted in a network of mutual obligations which guaranteed them a certain level of protection. Conversely, from the time of colonial rule and, above all, with the introduction of capitalist economy and the consequent changes in the social structure, women have retained their subordinate status but have lost the traditional forms of protection. A clear example can be seen in the customary exclusion of wives from inheriting the husband's estate. This exclusion was compensated by the practice of "women's inheritance", which allowed women to remain in the deceased husband's household and to receive enough land to maintain themselves and their children.⁵⁹¹ This practice is now disappearing and heirs are either not willing or not able to provide maintenance for the widows.⁵⁹² Therefore, widows are left with nothing. The unfairness of the exclusion from inheritance is more significant considering that as a consequence of industrialisation and the crisis of the economy of subsistence, women contribute to the estate from which they are completely excluded even by working outside the household. Social and economic changes have distorted customary norms as they have only been partially maintained and the practices which provided some form of protection for women have disappeared. In this framework, the constitutional legitimisation of discriminatory constitutional norms appears even more harmful to them.⁵⁹³

⁵⁸⁹ Munalula, *Law as an Instrument*, cit., p. 132.

⁵⁹⁰ Himonga, Turner, Beyani, *An Outline*, cit., p. 158.

⁵⁹¹ If she was not 'inherited', she returned to her own kin until she remarried again.

⁵⁹² This is the outcome of the research carried out by the Law Development Commission in 1976; see its Report, cit., p. 1 quoted in Munalula, *Law as an Instrument*, cit., p. 142.

⁵⁹³ On this point see R. Howard, "Women's Rights in English-Speaking Sub-Saharan Africa", in C. Welch and R.I. Meltzer (eds.), *Human Rights and Development in Africa*, State University of New York Press, Albany, p. 64.

9.2 The 1996 Constitutional Amendments

The amendments adopted in 1996 seem to correspond to the commitment made by MMD during the 1991 election campaign, when it was declared that a new constitution would be enacted in order to strengthen democracy and human rights. In reality, the constitutional review of 1996 was not used for this purpose. On the contrary, it even marked a period of renewed human rights' repression. If the amendments have any value, this can be found in the provision of a clearer understanding of the attitudes existing in contemporary Zambia with regard to human rights.

9.2.1 The Amendment Process: The Work of the Mwanakatwe Constitutional Review Commission and the Views of Zambian Civil Society

In 1992, the Minister for Legal Affairs established a taskforce composed of seven members which was chaired by the Attorney General, with the mandate of creating a draft for the amendment of the 1991 Constitution. In realising that the appointment of this group by the government could give rise to charges of bias, it was later decided to create a Constitutional Review Commission, which was appointed on 22nd November 1993 under the terms of Statutory Instrument No. 151/1993 as amended by Statutory Instrument 173/1993. Pressure from donor governments also played a role in this development.⁵⁹⁴

This Commission was composed of twenty-four members and was presided over by John M. Mwanakatwe. As a result of the modalities of appointment, it was considered broadly representative of Zambian society. Seven members were appointed directly by the President, while the remaining ones were appointed on the recommendations of political parties, religious organisations, professional associations and non-governmental organisations. Its scope of action was rather wide, especially when compared with the two previous constitutional commissions (i.e. the Commission for the establishment of a one-party system and the one of 1991). In the terms of reference, human rights were greatly emphasised. The Commission was called upon to collect views on what type of constitution Zambia should adopt *"bearing in mind that the Constitution should exalt and effectively entrench and promote legal and institutional protection of fundamental human rights and stand the test of*

⁵⁹⁴ J.K. van Donge, "Reflections on Donors, Opposition and Popular Will in the 1996 Zambian General Elections", in 36 *The Journal of Modern African Studies*, 1998, p. 86.

time”,⁵⁹⁵ and it was invited to recommend “*appropriate arrangements for the entrenchment and protection of human rights, the rule of law and good governance*”.⁵⁹⁶

The Commission began its work in December 1993⁵⁹⁷ and from March to September 1994 it toured the country conducting forty-six public sittings in order to collect the views of the population on the 1991 Constitution. The participation of the population was extremely wide and represented all sections of Zambian society, such as politicians, traditional rulers, clergy-men, judges of the Supreme Court and Magistrates, representatives of associations, students, business-men, farmers, civil servants, diplomats, as well as the more disadvantaged and vulnerable members of society. Women, people with disabilities, and even children participated in the sittings of the Commission and they often travelled long distances to be present. From this tour, the Commission received 996 oral and 461 written submissions from individual citizens, in addition to written submissions from Members of Parliament (4), political parties (10), associations (25), the judiciary (5), Zambians residing abroad (9) and the loosely specified “other government institutions” (5).

The content of these submissions, as detailed in the Report, reveal that at least on the part of the individuals, and probably even more so of the associations who presented them, there was a sophisticated level of human rights awareness. Indeed, the proposals formulated were specific, covered all the aspects of the constitutional protection of fundamental rights and freedoms and showed that international human rights instruments and foreign constitutions were taken into consideration. There were three main concerns which emerged from the Report: the strengthening of the scope of human rights, the creation of appropriate enforcement machinery and the limitation of the possible restrictions and derogations to human rights. In regard to the first point, the enhancement and even reformulation of certain rights that were already constitutionally recognised as well as the addition of new sets of rights was requested. The core submissions continued to be dominated by civil and political rights even though a demand for a more adequate guarantee of social and economic rights also emerged. Women and children’s rights were strongly advocated, as the 1991 Constitution was silent on these issues. It was claimed that this protection was necessary to put an end to the discrimination and suffering caused by some customary practices.

With reference to the fundamental question of the enforcement of protective provisions, the majority of those who presented submissions argued for the need not only to

⁵⁹⁵ Statutory Instrument No. 151 of 1993. Term of Reference No. 1.

⁵⁹⁶ Ibid. Term of Reference No. 3.

⁵⁹⁷ The Commission visited also Scandinavian countries to study their constitutional models.

reinforce the current system based on the recourse to the High Court but also to create new bodies such as a Human Rights Commission. The proposal for establishing a Human Rights Commission also followed the example of the Munyama Human Rights Commission created in 1993 to investigate the human rights violations which occurred not only during the single-party regime (between 1972 and 1991) but also after the rise to power of the MMD after 30th October 1991.

The final point of major concern, which emerged during the work of the Commission, relates to the curtailment of fundamental rights and freedoms through exceptions and derogations. In this regard, it was suggested that a limitation clause of general application should be devised in relation to all the rights and freedoms recognised. The petitioners expressed equal concern for the violation and restriction of human rights through the declaration of a state of emergency which Zambia has witnessed throughout its history. In this case, however, while the specific issues at stake were agreed by all of the petitioners, the proposed solutions varied among them.

During the tour, the issue of the domestic implementation of international human rights instruments arose and, in this regard, the principle of the universality of human rights was stressed. In concrete terms, the adherence to this principle was translated into the request that the Constitution would draw inspiration from the International Bill of Rights and that the courts would recognise the international human rights documents ratified by Zambia.

These submissions were subsequently compiled in a Report issued on 16th June 1995 containing the recommendations for the constitutional review and the Draft Constitution.⁵⁹⁸ The Commission accepted most of the proposals formulated by the petitioners. It recommended the strengthening of some of the rights already constitutionally safeguarded as well as the inclusion of others. These included the respect for human dignity; the right to equality before the law; administrative justice, fair trial and due process of law; freedom of the press and media, the right of journalists not to be compelled to divulge their sources of information; academic and intellectual freedoms and the right to culture; freedom of demonstration and to petition, the right to receive a response thereof; the right to vote and to be elected in any organisations or political party; the right to strike and to lock-out; the right to equal pay for equal work, and the right to fair and just working conditions; the right to equal treatment, affirmative action for women and other disadvantaged persons; the right to found a family, protection for the family; special protection of children and persons with

⁵⁹⁸ *Report of the Constitutional Review Commission*, Lusaka, 16th June 1995.

disabilities; and the right to a clean environment. With regard to women, the Commission not only welcomed the idea of introducing affirmative action but also addressed the complex question of the potentially conflicting relationship between customary norms and practices with fundamental rights. As a result, it recommended that *"all laws, customary practices, and stereotyped attitudes which are against the dignity, welfare or interest of women or which otherwise adversely affect their physical and mental well-being be prohibited"*. In relation to the acquisition of citizenship by marriage, the Commission did not agree to the widespread demand by women's groups for the extension of the provisions concerning foreign women married to Zambian men to include foreign men married to Zambian women. Instead, they recommended to remove this provision to completely.

Some of the rights, including social and economic, were included in the "Directive Principles of State Policy". These principles include a list of non-judicially enforceable principles which would play the role of guidelines for the activity of the legislature, the government and the judiciary.⁵⁹⁹

It is interesting to note that the Commission supported the human rights model inherited from independence, as civil and political rights continued to constitute the core of the constitutional human rights protection and this was explained by the Commission that they constitute a necessary pre-condition for democracy. There was no inspiration drawn from the African Charter and no particular attention was devoted to collective rights, whose centrality had been long advocated in sub-Saharan African human rights discourse. Evidence of this attitude can be seen by the comment on the right to development made by the Commission. After noting that this right is recognised in some African constitutions, the Commission stated that it found it "rather nebulous" and for this reason recommended that it should be merely included in the Directive Principles.

The Commission agreed with the petitioners on the issue of the constitutional limits to fundamental rights and freedoms and recommended the provision of a single limitation clause of general application,⁶⁰⁰ which was supposed to guarantee citizens greater clarity on the content of their rights and assist the judiciary in its assessment of the constitutionality of the restrictive measures. In the case of the declaration of a state of emergency, apart from specific guarantees for individuals subjected to detention or restriction, it recommended that the constitution would indicate the specific circumstances which can justify this declaration, such

⁵⁹⁹ Ibid., Chapter 4, par. 4.0-4.3.7.

⁶⁰⁰ Restrictions would have to be necessary in the interest of defence, public safety, public order, public morality or public health.

as threats to the security of the country caused by invasion, general insurrection or national disaster.

With regard to enforcement, the Commission made a recommendation for the establishment of a Constitutional Court, which would have jurisdiction, amongst other matters, over any alleged violation of fundamental rights and any matter relating to the interpretation of the Constitution. An independent Human Rights Commission with pedagogical functions, investigative powers and the authority to bring proceedings in court on behalf of an aggrieved individual was also suggested.

Although the overall impression of the work of the Commission was positive, as it proved to be attentive to the comments of civil society aimed at enhancing human rights protection in the Zambian constitutional system, however there were two proposals which raise some questions. The Commission formulated some discriminatory recommendations with a clear political motive behind it. The first of these recommendations provided that in order to stand in presidential elections, it was necessary for the candidate to be a citizen of Zambia, born in Zambia, of parents who are Zambian citizens and are also born in Zambia.⁶⁰¹ This provision was clearly aimed at preventing Kenneth Kaunda from participating in elections since both of his parents were born in present-day Malawi. It also affected hundreds of thousands of other Zambian citizens.⁶⁰² The second proposal envisaged that a traditional chief should renounce the chieftainship before becoming a candidate in any election or being appointed to any office in political party.⁶⁰³ This recommendation was most likely put forward to eliminate the UNIP's Vice-President, Senior Chief Inyambo Yeta, from the political scene. Besides him, other political figures linked to the political institution of chieftaincy had emerged. The National Party was led by Dr. Inonge Mbikusita Lewanika, the daughter of the Litunga, i.e. the king of the Lozi ethnic group. After the fall of the Kaunda's regime, ethnicity has become an issue. Kaunda dealt with it by using a technique of ethnic balancing within the structures of the single party and in the Cabinet. Chiefs were present in the Central Committee of UNIP and were accorded responsibilities in their regions. When Chiluba was elected in 1991, the different ethnic groups, which overwhelmingly voted for him, expected to be rewarded, but Chiluba stopped the careful ethnic balancing of his predecessor. This provoked strong resentment, which in the case of the Lozi in the Western Province led to secessionist

⁶⁰¹ Ibid., Chapter 11, para. 11.4.1.

⁶⁰² Another provision which was aimed at the same objective was that "no person who has twice been elected as President shall be eligible for re-election to that office". See *ibid.* Chapter 11, para. 11.5, 29. The 1991 Constitution also prohibited the dual mandate but it did not have retroactive effect as it only referred to the elections carried out after 1991.

⁶⁰³ Ibid., Chapter 12, para. 12.6.36.

claims in 1993. The Lozi claimed the formation of a separate state to be called with its original name Barotseland⁶⁰⁴ and governed by the Litunga. Others had less ambitious demands and demanded only the application of the 1964 Barotse agreement between Kaunda and the Litunga, which recognised the king a series of powers, including over land, forest and hunting. The recommendations of the Mwanakatwe Commission recognised the authority of the chiefs, but did not accord them any form of power sharing and even impede them to participate in politics.

9.2.2 The Governmental Position and the 1996 Amendments

The government responded to the Commission's draft with a White Paper,⁶⁰⁵ in which most of the recommendations formulated for a stronger protection of human rights were rejected. In particular, it did not accept the inclusion of new rights, such as the provisions on women's rights or the establishment of a Constitutional Court. Moreover, it refused that the separation between the State and the Church should be guaranteed by opting for a declaration in the preamble of the Constitution that Zambia is a Christian state.⁶⁰⁶ The only progressive recommendations accepted were those concerning the establishment of a Human Rights Commission and the inclusion in the Constitution of principles of state policy.⁶⁰⁷ Unsurprisingly, consistent with its lack of concern for the enhancement of the constitutional safeguard of human rights, the government welcomed the two discriminatory proposals contained in the Mwanatkwe Commission's Report. These included the limitation of the eligibility for presidential election and the incompatibility of the status of traditional chief with political activity.

The White Paper provoked strong criticism on the part of opposition parties, churches, university scholars, trade unions and a large part of the population.⁶⁰⁸ This discontent was intensified by the government's rejection of the recommendations that the new constitution should have been adopted by a Constituent Assembly representative of all political parties as

⁶⁰⁴ The Barotseland enjoyed separate status under the British rule.

⁶⁰⁵ Government Paper, No. 1, 1995.

⁶⁰⁶ Ibid., para. 3.6.11. The Commission had expressed its opposition to this amendment. See Chapter 3, para. 3.6.10. The churches also opposed this declaration. The Catholic Bishops Conference highlighted in an open letter to President Chiluba and to Members of Parliament on 26th April 1996 that this declaration would cause division and intolerance against the other religions in Zambia, such as Hinduism, Islam and the worship of ancestral spirits.

⁶⁰⁷ Ibid., par. 8.1.29.

⁶⁰⁸ A Conference was held from 1st to 10th March 1996, on initiative of the churches and NGOs to discuss and urge opposition by the population to the amendments; see *Citizens' "Green Paper" Summary of Resolutions by the Citizens' Convention on the Draft Constitution*, 1-10 March, Lusaka, 1996.

well as civil society,⁶⁰⁹ and ratified by a referendum.⁶¹⁰ The government opted, conversely, for a parliamentary procedure for amendment. It could legally make recourse to such procedure due to having decided not to intervene directly on the bill of rights, which otherwise would have required the holding of a referendum under the terms of Article 79 of the 1991 Constitution. This response was met with strong reaction, for example submissions were presented before the High Court and the Supreme Court and three Ministers resigned.⁶¹¹ International donors such as the United States, Britain, Japan and the Scandinavian countries reacted against both the content and the modalities of adoption of the amendments, by suspending and, in some cases, by withdrawing aid.

Despite the overwhelming condemnation of the government, the National Assembly approved the amendments to the 1991 Constitution along the lines of the White Paper.⁶¹² This occurred due to the fact that the Parliament was completely dominated by the MMD. This was also helped by the UNIP's boycott of the proceedings. The 1996 amendments ultimately represented the betrayal of the political platform of MMD⁶¹³ and the terms of reference of the Mwanakatwe Commission, both of which had presented the enhancement of human rights as one of the main goals of the constitutional review. On the contrary, not only were most of the improvements proposed by the Mwanakatwe Commission rejected, but limitations to the rights of political participation, as well to the principle of equality and the freedom of religion were also introduced. Thus, the introduction of Article 34(3)(b) provides that one of the conditions for eligibility as a presidential candidate is that the parents of the candidate must be both Zambians by birth or descent and that the candidate has been domiciled in Zambia for twenty years.

The preamble was completely changed and this reflects the different influences affecting the amendment process. In particular, it reveals the influence of the Christian beliefs of Chiluba⁶¹⁴ as it asserts that Zambia is "*a Christian nation while upholding the right of*

⁶⁰⁹ The Report contained a list of the sectors that would be represented: professions, the labour movement, employers, women's organisations, universities, etc.; see Report of 1995, cit., Chapter 27.

⁶¹⁰ Ibid., Chapter 28.

⁶¹¹ See *Derrick Chitala (Secretary of ZDC) v. Attorney General* 1995/SCZ/14 and *Derrick Chitala v. Attorney General* (High Court, 1996).

⁶¹² Constitution of Zambia Amendment (Act) No. 18, 1996, cit. In particular see Article 34(3)(b): "*Election of President*" and Article 65(3) and (4): "*Disqualification for Election in the National Assembly*".

⁶¹³ In its revised manifesto published in August 1996, MMD stated that its commitment was "*to institutionalise what has been achieved so as to make Zambia the haven of human rights, not subject to disruption even in the change of government*". Moreover, it asserted its commitment to create a Human Rights Commission; to ratify international human rights treaties and to guarantee the protection of human rights as provided for in the constitution; see MMD *Manifesto*, full text printed in *The Sun* (Lusaka), September 2-8, 1996 referred to in Human Rights Watch Africa, *Zambia. The Reality Amidst Contradictions*, July 1997, Vol. 9, No. 3 (A).

⁶¹⁴ Chiluba is born-again Christian.

every person to enjoy that person's freedom of conscience or religion". It also makes a concession to women's pressure for the recognition of women's rights, by recognising "the equal worth of men and women in their rights to participate, and freely determine and build a political, economic and social system of their own free choice". Moreover, the gender-biased language which characterised the preamble of the 1991 text was eliminated. With respect to gender equality, a further sign of change came with the Directive Principles of State Policy, which provide that the "State shall take measures to promote the practice, enjoyment and development by any person of that person's culture, tradition, custom and insofar as these are not inconsistent with this Constitution". This provision seems again another concession. It recognises that there are certain traditions and customs, which may conflict with the principles established by the constitution, however the actual force of this provision is undermined by the mere guiding nature of the directive principles. The preamble also incorporates the key terms of the World Bank's conditionality jargon by declaring that "[t]he people of Zambia ... resolve to uphold the values of democracy, transparency, accountability and good governance".

It is interesting to remark that after the amendment the preamble no longer incorporates any of the references to social and economic rights that were previously contained in the text. The 1991 preamble recognised the right to work, to the free choice of employment, to just and favourable conditions of work and to protection against unemployment, as well as the right to education. Moreover, it pledged "to all citizens the right to equal access to social, economic and cultural services and facilities provided by the State or by public authorities". As seen before, the government refused to confer any protection on these rights in the bill of rights. However, the concern for the socio-economic conditions of citizens is expressed in the introduction of Part IX concerning "Directive Principles of State Policy and the Duties of a Citizen". Article 110 indicates that these principles constitute a "guide" for the executive, the legislature and the judiciary in the development of national policies, implementation of national policies, making and enactment of laws, the application of the Constitution and any other law, and that these principles are not justiciable. Article 110 (2) specifies that the application of these principles "may be observed only in so far as State resources are able to sustain their application, or if the general welfare of the public so unavoidably demands, as may be determined by Cabinet". Article 112 lists the directives which constitute the principles of state policy. These include, among others, that the State "shall be based on democratic principles" and shall endeavour "to create the conditions under which all citizens shall be able to secure adequate means of livelihood and opportunity to

obtain employment”, “to provide clean and safe water, adequate medical and health facilities and decent shelter for all persons, and take measures to constantly improve such facilities and amenities”, “to provide equal and adequate educational opportunities in all fields and at all levels for all”, “to provide persons with disabilities, the aged and other disadvantaged persons such social benefits and amenities as are suitable to their needs and are just and equitable”. Moreover “the State shall recognise the right of every person to fair labour practices and safe and healthy working conditions”. The preamble also includes a reference to collective rights, even though the terminology of ‘rights’ is not used. Instead, it states that “the State shall strive to provide a clean and healthy environment for all”.

Article 113 lists the duties of the citizens. These encompass the duty to: (a) “be patriotic and loyal to Zambia and to promote its well-being”, (b) “contribute to the well-being of the community where the citizens live, including the observance of health controls”, (c) “foster national unity and live in harmony with the others”, (d) “promote democracy and the rule of law”, (e) “vote in national and local government elections”, (f) “provide defence and military service when called upon”, (g) “carry out with discipline and honesty legal public functions”, (h) “pay all taxes and duties legally due and owed to the State; and (i) “assist in the enforcement of the laws at all times”. It should be noted that none of the duty listed constitute a limitation on the rights protected in the bill of rights.

Another Part inserted with the 1996 amendment concerns the establishment of the Human Rights Commission. The Constitution devotes only two articles to this (Articles 125 and 126) and provides that it shall be autonomous. It relies upon an Act of Parliament to define its functions, powers, composition, funding and administrative procedures.

The 1996 Constitution also reintroduces the House of Chiefs, which had been provided by the 1964 Constitution and maintained under the 1973 one-party Constitution, but eliminated from the 1991 Constitution. The new Part XII establishes the House of Chiefs as an advisory body on “traditional, customary or other matters referred to it by the President” (Article 130). Moreover, it has the power “consider and discuss any Bill with, or touching on, custom or tradition”, “initiate, discuss and decide on matters that relate to customary law and practice”, “consider and discuss any other matter referred to it for its consideration by the President or approved by the President for consideration by the House” (Article 131) The House of Chiefs is composed of twenty-seven members, elected by the Chiefs from each one of the nine Provinces of the Republic (Article 132(1)). If these provisions recognise the institution of chieftaincy, Article 133 shows the suspicion and fears such institution rises. Article 133 establishes that the office of member of the House of Chiefs becomes vacant if the

Chief becomes a candidate in any election or accepts any appointment in a political party.

9.2.3 The Human Rights Commission

The Commission was appointed in 1997 under the Human Rights Commission Act. Its creation was recommended by the Munyama Human Rights Commission that was set up by Chiluba between 1993 and 1995 to investigate prison conditions and human rights violations which took place from 1972 to 1993.⁶¹⁵ It has very weak powers, even when compared with the principles concerning national human rights institutions set by the UN Commission on Human Rights in 1992 and endorsed by the UN General Assembly in 1993. The UN Principles relating to the status of National Institutions, known as the Paris Principles,⁶¹⁶ emphasise the need for the human rights institutions to have a constitutional or legislative statute as a guarantee for independence; a broad mandate; an independent appointment procedure with term of office specified by law; a pluralistic and representative composition; regular and effective functioning; independence from the executive branch and adequate funding. They should be entitled to consider any human rights issue on their own initiative, at the government's suggestion or at the request of any petitioner. Its responsibilities should encompass reporting and making recommendations to the government on human rights matters, including the adoption or amendment of national legislation and the reporting of human rights violations; promoting conformity of national law and practice with international human rights standards; cooperating with national, regional and UN human right bodies, including contributions to country reports submitted to UN treaty bodies and committees and human rights education programs. Their powers should also include the possibility of making public statements on their work, in particular, through the media. Human Rights institutions should also be vested with powers which allow them to address and resolve specific cases of human rights' violations. More specifically, they should be empowered to seek "amicable settlements", or to adopt "binding decisions", or finally, to pursue a settlement "where necessary, on the basis of confidentiality". If complaints are not resolved by human rights institutions, they should be sent to the appropriate authority.

⁶¹⁵ The Munyama Commission had also recommended the creation of an independent Police Complaints Authority to investigate complaints against police officers as the Commission had assessed that these remained uninvestigated and that human rights abuses were still practised by the police in 1995.

⁶¹⁶ These principles were endorsed by the U.N. Commission of Human Rights with Resolution 1992/54 and by the General Assembly with Resolution A/Res/134 of 20/12/1993. The Paris Principles define national human rights institutions as government bodies created by law or constitutions and are designed to protect and promote human rights.

The **Zambian Commission's** degree of independence, functions and powers are more limited than those described above. It can investigate human rights violations and maladministration of justice and propose effective measures to prevent human rights abuses (section 9 (a)-(f)). These investigative powers can be exercised either on the Commission's own initiative or on receipt of a complaint. Moreover, the Commission is entitled to issue summons or orders requiring the attendance of any authority before it, to recommend the release of a person from detention and to order the payment of compensation to a victim of human rights abuses. It can also recommend individuals, whose rights have been violated, to seek redress in a court of law (Sections 10(2) and (3)). Finally, it is vested with the power to send written reports of its findings to the parties concerned and to make the recommendations which it deems necessary to the appropriate authority (Section 13(1)). Its investigative functions are not complemented by the power to enforce the relevant findings and the Commission does not even have the right to seek settlements of human rights violations, as provided in the Paris Principles. The fact that the appointment of the Commission is vested in the President and the absence of any reference in the Act to the issue of funding constitute a potential threat to its independence.

For all of these reasons, the establishment of the Commission was received with great suspicion within Zambia. All of the main opposition parties and NGOs refused to recommend any names to the President for the appointment of the Commissioners. The fact that the six members appointed by the President and then approved by a select parliamentary committee lacked any previous experience in the field of human rights reinforced the sense of disillusion. Despite the doubts surrounding the independence and competence of the Commissioners, the **Zambian Human Rights Commission** has addressed some of the abuses occurring in the country, including ill-treatment and torture by the police forces, even though it has not yet dealt with any issue with a high political profile. As a result of its work, it has gained increasing respect. Through press releases, the Commission has denounced human rights abuses and its major stand has been on the widespread recourse to torture by the police. In 1997, it denounced the cases of torture of detainees after the attempted coup. Although it recommended at first that those responsible should be brought to justice, in its report of 30th March 1998, it merely recommended that the officers concerned should retire in the public interest and did not call for the opening of criminal proceedings. Despite the caution shown by the Commission, the government 'punished' it for its stand on this issue, by refusing to

give the Commission the premises that it had been promised.⁶¹⁷ Nonetheless, the Commission has continued to deliver statements on human rights violations with many cases addressing employment-related complaints and prison conditions. From 1997 to 1999, it handled 960 grievances, the majority of which did not concern civil rights abuses but rather complaints concerning social rights. Some 797 were employment-related complaints.

9.3 The Human Rights Situation after the Reintroduction of Multipartyism⁶¹⁸

The human rights performance of the Chiluba government and the MMD ended up dramatically resembling the authoritarian Kaunda's era.⁶¹⁹ In 1991, one of the core elements of the MMD's manifesto was the enhancement of human rights, including both civil and socio-economic rights. However, during the Chiluba government, civil liberties were violated, in particular by the police in an attempt to prevent any form of manifestation of opposition or mere criticism of the regime. Extra-judicial killings, torture, beating of suspects and detainees and arbitrary arrests were frequent in a general climate of impunity. Freedom of assembly and of the press was also severely limited.

The crisis in the human rights situation in Zambia became more acute with the parliamentary and presidential elections held after the adoption of the 1996 constitutional amendments. These elections witnessed the landslide victory for the MMD as it obtained 139 seats in the National Assembly out of 159 (eight of them are of presidential appointment) and Chiluba was elected president with 68.9 percent of the votes. This victory, which made Zambia a predominant party system,⁶²⁰ was also due to the decision of the UNIP and six other parties to boycott the elections as a response to the conduct of the MMD during the constitutional amendment process and to its general unwillingness to engage in dialogue with the opposition. There were also many irregularities which contributed further. These

⁶¹⁷ Human Rights Watch, *Protectors or Pretenders? Government Human Rights Commissions in Africa, Overview*, 2001 available at <http://www.hrw.org/africa/overview/record.html> On the Zambian Human Rights Commission see also Human Rights Watch, *Protectors or Pretenders? Government Human Rights Commissions in Africa, Zambia*, 2001

at <http://www.hrw.org/reports/2001/africa/zambia/zambia.html>

⁶¹⁸ The thesis focuses on the Chiluba period as it is premature to formulate conclusive judgments on the post-Chiluba period, which started after the 2003 presidential elections.

⁶¹⁹ R. Joseph, Africa, "1990-1997: From *Abertura* to Closure", in 9 *Journal of Democracy*, 1998, p. 6.

⁶²⁰ See P. Burnell, "The Party System and Party Politics in Zambia: Continuities Past, Present and Future", in 100 *African Affairs*, 2001, pp. 239-263.

irregularities were denounced by independent electoral monitoring organisations⁶²¹ and the international community.⁶²²

After the elections, the government made it clear that it was not serious about the actual implementation human rights, by showing that they were merely included in the electoral programme for rhetorical purposes in order to obtain legitimacy on the internal and international political arena. The MMD government did nothing to eliminate the oppressive laws in force since colonial times and conversely, it used to curb the opposition. For example, the government made extensive recourse to the provisions of the Penal Code,⁶²³ punishing the offence of sedition,⁶²⁴ defamation of the President⁶²⁵ and criminal libel⁶²⁶ and empowering the President to ban publications. Moreover, the State Security Act⁶²⁷ of 1969 was applied to prevent the publication of articles in the private-owned media alleging that it constituted a threat to public security due to the disclosure of confidential information. Another piece of legislation dating back to colonial times and with an equally illiberal nature is the Emergency Powers Act⁶²⁸ which reinforces the wide powers conferred on the executive by the constitution in the case of a state of emergency. It gives the President very broad and ambiguously defined powers. Section 3(3) recognises the power to make orders and rules for any purposes without any further specification. Section 4 establishes that state of emergency regulations as well as orders and rules enacted under this Act prevail over other enactments. In addition, the Emergency Powers Act provides that in the case of a declared state of emergency, the President is entitled to invoke the Preservation of Public Security Act and to adopt the Preservation of Public Security Regulations on the basis of which the police can detain a person for 28 days under a Police Detention Order. This order can be followed by a Presidential Detention Order which permits the detention of an individual for an indefinite period.

The Chiluba government not only took advantage of existing illiberal laws but it was also engaged in legislative activity aimed at creating restrictions for controlling or hindering the opposition. In March 1996, the Public Order (Amendment) Act, No.1 was approved

⁶²¹ The Zambian Independent Monitoring Team (ZIMT), the Forum for a Democratic Process (FODEP) and the Committee for a Clean Campaign (CCC).

⁶²² The international community did not endorse the results, and countries such as South Africa and Zimbabwe did not recognise them either. Human Rights Watch also denounced many irregularities. On the 1996 elections, see Chanda, Zambia, cit., pp. 147-152.

⁶²³ Chapter 146 of the Laws of Zambia.

⁶²⁴ Sections 57, 60, 61.

⁶²⁵ Sections 69 and 71.

⁶²⁶ Sections 191-198.

⁶²⁷ Chapter 3 of the Laws of Zambia.

⁶²⁸ Chapter 108 of the Laws of Zambia.

containing amendments to Chapter 4 of the Public Order Act. It provided that a fourteen days notice should be given to the police before any meetings, processions or demonstrations. Furthermore, according to this amendment, the police have discretionary power in deciding whether to allow the meeting or rally to take place, and this violation of the law is punishable with a maximum of sentence of seven years. Following wide criticism from the public and the Supreme Court ruling on the unconstitutionality of this provision,⁶²⁹ the government reduced the time of notice to seven days. The police frequently used this power to impede demonstrations and rallies organised by the opposition.

Apart from the freedom of assembly, the freedom of the press was also threatened by the executive. A vibrant independent private media exists in Zambia, which is not afraid to criticise government. The Post, which is the best-selling private daily newspaper, and the Monitor, the newspaper of the NGO Inter-Africa Network for Human Rights and Development (AFRONET), openly denounce abuses by the government and the MMD. It is in this context that the conclusions of the Media Reform Committee were disregarded, which was established after the 1991 election in conformity with the original MMD's commitment to human rights. The Media Reform Committee singled out twenty-six laws as in contradiction with the freedom of expression, however no initiative was taken to repeal or amend these laws, and an attempt was made to introduce even more restrictive legislation. In April 1997, the government presented a Bill, known as the Media Council Bill, which would have serious implications for the freedom of the press.⁶³⁰ According to this bill, all journalists would need specific qualifications and a licence or "accreditation" by a media council appointed by the Minister of Information. This would only be released after investigations and the payment of a fee. Journalists who lacked accreditation be subject to three months imprisonment, a fine or both. In addition, reprimand suspension or expulsion could be inflicted as disciplinary measure on those whose conduct is contrary to "the profession of journalist" or who are engaged "in any occupation which is inconsistent with the profession of a journalist". Complaints from the public could be presented to the Media Council, which

⁶²⁹ *People v. Christine Mulundika and six Others and the People v. Dr. Kenneth D. Kaunda*, 1995/SCZ/25.

⁶³⁰ The motivation for this bill was clearly expressed by President Chiluba. The following quote conveys the way the president viewed the concept of the freedom of the press. He said: *"Integrity demands that media practitioners adhere to a standard of ethics that have respect for the truth and fairness ... it is a notorious fact that the nation and indeed the press itself has been brought into disrepute by a section of the media that has chosen to betray the country by publishing and distributing false information about Zambia. This is regrettable and a matter of great concern"*. This is quoted from a speech delivered on the opening day of parliament, MISA, Alert, May 5, 1997 quoted in Human Rights Watch, Zambia. The Reality, cit., p. 23. In addition, according to deputy Minister of Information and Broadcasting, Ernest Mwansa in Parliament on 6th February : *"This freedom seems to have gone slightly out of course"*; see *ibid.*, February 27, 1997 quoted in *ibid.*, p. 23.

would have the power to order an apology or compensation from journalists or the media, as well to take them off the register. As a result of the firm resistance from independent journalists, human rights groups and donor countries and also the state media itself, the government withdrew the bill.

Zambian NGOs have also been under threat of the executive. Chiluba challenged many of them as serving foreign interests.⁶³¹ In August 1999, the government presented the State Security Bill to the Parliament, under which a suspect could be detained without charge for fourteen days and the detention could be prolonged without limit by a magistrate. Due to the firm opposition from NGOs and MPs, the bill, which would have created a permanent state of emergency as denounced by Human Rights Watch,⁶³² was withdrawn.

Alongside these restrictive legislative measures, human rights have been curtailed in Zambia by a series of illegal acts directed at hindering any form of opposition. For example, police brutality and torture in detention centres has been widespread. Harassment and intimidation by the police or intelligence forces of independent journalists, editors,⁶³³ members of civil society organisations,⁶³⁴ and political opponents⁶³⁵ have been extremely frequent in Zambia. On 23rd August 1997, the ex-President and UNIP's leader Kaunda and the chairman of Opposition Alliance were shot and wounded by the police during a rally. The judiciary have also been among the targets of human rights abuses. In particular, the judges who displayed independence from the executive and the MMD were subject to personal attacks directed at destroying their reputation, consequently forcing them to resign.⁶³⁶

The most serious human rights violations that have taken place in Zambia occurred in the aftermath of the attempted military coup on 28th October 1997. This led President Chiluba to declare a state of emergency the following day,⁶³⁷ consequently, suspending many of the

⁶³¹ See Human Rights Watch, *World Report. Zambia*, 1998, p. 80.

⁶³² *Ibidem*.

⁶³³ On 25th November 1996, the Zambia Information Service Acting Deputy Director Mundia Nalishebo and five other state media journalists were suspended for alleged collaboration with an electoral monitoring group which had judged the election to be irregular. Between 18th November, 1996 and the end of 1997, four independent journalists were imprisoned and six state-run television journalists were suspended and then dismissed; see Human Rights Watch, *World Report. Zambia*, cit., 1998, p. 78.

⁶³⁴ In the aftermath of the 1996 elections, the Zambian Independent Monitoring Team (ZIMT), the National Committee for Clean Campaign (NCCC) and the Africa Network for Human Rights and Development (AFRONET) were targeted for having criticised the way in which the 1996 elections took place. The state security agencies made an incursion into their offices, confiscating their documents and the leaders were put in detention; see E. Gymah-Boadi, "The Rebirth of African Liberalism, in 9 *Journal of Democracy*, 1997, p. 22 and Chanda, cit., p. 139.

⁶³⁵ Before the 1996 elections, six leaders of UNIP were held in custody for around five months and were then acquitted of treason; see *The People v. Senior Chief Inyambo Yeta and seven Others* (1996)(unreported).

⁶³⁶ Chanda, cit., pp. 140-141.

⁶³⁷ Chiluba had already declared a state of emergency in 1993 on the ground of an alleged plot to overthrow the government by UNIP with the support of Iran and Iraq. On the extent of the human rights violations during the

rights guaranteed by the constitution, as the constitution itself authorises. The right to personal liberty and the freedoms of expression, association and assembly were amongst the most affected. The latter was severely limited also as a result of the discretionary power given to the police to permit rallies under the Public Order (Amendment) Act adopted in the previous year. Harassment against lawyers, national and international journalists and political opponents became more intense. Extensive recourse was made to preventive detention against those suspected to have been involved in the attempted coup. The main opposition leaders were arrested on this charge, among whom included Kenneth Kaunda and the leader of the Zambia Democratic Congress (ZDC), Dean Mung'omba. Mung'omba was also subject to beating and torture. Through these means, the MMD government achieved their objective as Kaunda, the main political threat to MMD, retired definitely from politics in exchange to the dropping of the charges against him.⁶³⁸ This situation led to opposition not only in Zambia but also from Western donor countries, the EU and the World Bank. As a result of the reaction of the donors, the state of emergency, which had been extended on 29th January 1998, was finally lifted on 17th March.⁶³⁹ Since then improvements in the human rights situation took place but political activity continued to be hindered and cases of police brutality, illegal detentions, torture, killings and rape in custody and abduction by the police of persons, particularly women related to suspects, continued.⁶⁴⁰ In this regard, it is worth noting that in responding to pressures coming from the Human Rights Commission, donors, Zambian and international NGOs, Chiluba established a commission of inquiry in August 1998. The commission was appointed by the President and headed by the High Court Judge Japhet Banda and was given the task of assessing the alleged cases of torture committed by the police in 1997. The report, which was submitted in 2000, documented that torture was used and that a climate of impunity prevailed. It also recommended that the victims of torture should be compensated, the members of the police responsible should be subjected to disciplinary action and reforms of the administration of justice adopted. The government responded that it

state of emergency, see Amnesty International, *Zambia. Misrule of Law: Human Rights in a State of Emergency*, March 1998.

⁶³⁸ He announced his retirement to the UNIP Central Committee on 3rd July.

⁶³⁹ It has to be pointed out that apart from Norway, the Netherlands and Sweden, the other European countries, the EU, Japan and the World Bank did not express their concern for the human rights situation except for the threats to democracy and good governance; see Human Rights Watch, *World Report. Zambia*, 1997, pp. 69-70 and *World Report. Zambia*, 1998, pp. 80-81.

⁶⁴⁰ See Human Rights Watch, *Zambia No Model For Democracy*, May 1998, Vol. 10, No. 2 (A) and *World Report 1999. Zambia: Human Rights Developments* at <http://www.hrw.org/hrw/worldreport99/africa/zambia.html> and *World Report 2001. Zambia: Human Rights Development* at <http://www.hrw.org/hr/wr2k/africa/zambia.html>, and Amnesty International, *Amnesty International Report 2002, Zambia*.

accepted the findings, but argued that the report had not taken the special circumstances in which torture was committed into account. Moreover, it decided neither to grant any compensation to the victims nor to adopt any disciplinary measure against the persons responsible of acts of torture. The persons responsible were even promoted.⁶⁴¹ The UN Committee against Torture also expressed its concern at the fact that even though the Zambian Constitution prohibits torture, the Zambian legal system has not fully incorporated the provisions of the UN Convention against torture, cruel and inhuman treatment⁶⁴² and “at the continued allegations of widespread use of torture together with the apparent impunity enjoyed by its perpetrators”.⁶⁴³

However, the Chiluba government could not always disregard public criticism. In January 2000, the Ministry of Information forced the private-owned Radio Phoenix to stop a live phone-in programme called “let the people speak: the Doctor’s strike” sponsored by AFRONET. The public denouncement by AFRONET of the political pressures to which it was subjected led to the return of the programme, albeit under condition that it would be pre-recorded and edited.

The most recent critical moment for civil rights in Zambia came with the 2002 presidential, parliamentary and local elections. Civil liberties were widely violated,⁶⁴⁴ and in particular the freedom of assembly and expression were harshly repressed. Hundreds of people were arrested during rallies and the police continued to use force to break up demonstrations organised by the opposition. The judiciary, however, offered some protection, as seen in the two High Court rulings on two occasions that these police actions were unconstitutional and in “bad faith”.⁶⁴⁵

The freedom of expression was also controlled. The government and the MMD used the public media in their favour and Chiluba did not hesitate to utilize public resources to attempt to convince citizens, politicians, chiefs, NGOs and religious leaders to support the revision of the Constitution, which would have allowed him to run for a third term. These tactics, however, did not produce the intended results and he had to abandon this plan because of the hard opposition of NGOs and MPs and pressures coming from within his party. This decision was welcomed enthusiastically by Zambian society. The authoritarian face of the

⁶⁴¹ A. Chanda, “Governance and Human Rights in Zambia”, in *Observer*, Vol. 5, September 2001, at http://afronet.org.za/hro_vol5/volume5_5.htm

⁶⁴² G.A. Res. 38/46 of 10/12/1984, entered into force 26th June 1997.

⁶⁴³ Conclusions and Recommendations of the Committee against Torture. Zambia. 23/11/2001. CAT/C/XXVII/Concl. 4, Twenty/seventh Session, 12th-23rd November 2001.

⁶⁴⁴ See Amnesty International, Amnesty International Report 2002, cit.

⁶⁴⁵ Ibidem.

Chiluba's government shown at the eve of the 2002 elections, however, did not affect the decision of the World Bank and the IMF to accord \$2.5 billion within the framework of the Highly Indebted Poor Countries (HIPC) program.

The December 2002 elections themselves, which witnessed the victory of the MMD presidential candidate, were criticised as flawed. The irregularities were denounced not only by the Zambian opposition parties and civil society organisations but also by observers from the European Union. The Electoral Commission provided by Article 76 of the Constitution and established under the Electoral Commission Act of 1996 did not exert effective control over the fairness of the electoral process in application of the Electoral Code of Conduct Regulations. Certainly the way in which its members were appointed did little to help its impartiality and undermined the trust it should enjoy from civil society. The Electoral Commission is composed of a Chairperson and not more than four other members, who are appointed by the President, subject to ratification by the National Assembly.

Given the very poor human rights record of the Chiluba government and the manner in which elections were held, the first challenge for the new President Levy Mwanawasa is to gain internal and international credibility, particularly, as he was elected with only 28.7 percent of votes. In this regard, it has to be remarked that his initiatives to fight corruption have lowered the suspicion with which he was looked at. He has started a campaign of fight against corruption, which has not spared Chiluba himself. Following the accusations by Mwanawasa, last year the Parliament lifted Chiluba's immunity from prosecution. Chiluba appealed this decision before the Supreme Court, which in a historic decision ruled that the Parliament had acted according to the law, thus allowing the arrest and trial of Chiluba.

His credibility also depends on the outcome of the constitutional revision process initiated in 2003. The procedure provided in the Public Inquiries Act is the same as in the past constitution-making processes. The President has appointed a Constitutional Review Commission with the task of formulating and submitting recommendations to the Government on the basis of consultations with Zambian citizens in Zambia and abroad. According to the terms of references, the Commission should make recommendations for the adoption of a Constitution which would effectively entrench and promote, among other things, the protection of human rights, democracy, the rule of law, good governance, transparency, accountability, impartiality and independence of the judiciary and the access of the public to justice. The Commission is also expressly asked to examine and recommend upon the elimination of discriminatory provisions, including those relating to the right of traditional rulers to engage in active politics. The procedure of the constitutional review has raised strong

criticism from opposition parties and, in particular, from civil society' organisations, who fear that this process will end up resembling the previous ones and, therefore, the Government will select the Commission's recommendations at its own discretion. For this reason, civil society's groups and opposition parties are demanding the adoption of the Constitution by a Constituent Assembly.

Internal credibility needs to be re-established also on the issue of social and economic rights. If donor countries and international financial institutions have only demonstrated their concern for civil rights, Zambians are increasingly expressing their dissatisfaction with the status of socio-economic rights. The Constitution already contains a very narrow approach in this respect, in which they are recognised as mere guiding principles and their implementation is subordinated either to the obvious condition of availability of resources, or to the fact that the "general welfare of the public so *unavoidably* demands" (emphasis added). The Zambian Constitution, therefore, conveys the message that the principles of state policies are not a political priority and the Chiluba government has confirmed this approach through its action. The Directive Principles of State Policy include the State's commitment to create the conditions for employment, to ensure fair labour practices, safe and healthy working conditions, adequate medical and health facilities, decent shelter and equal and adequate educational opportunities. These commitments have not been met in fact. Assessing the government policy against the ICSECR, of which Zambia is a state party, it is clear that the rights to work,⁶⁴⁶ social security,⁶⁴⁷ an adequate standard of living (including adequate food, clothing and housing),⁶⁴⁸ health⁶⁴⁹ and education⁶⁵⁰ have been denied to a large portion of the population. This has occurred in the context of mismanagement and appropriation of public resources. For example, in April 2001, two billion Kwacha was diverted from the National Assembly to fund the Convention of the MMD.⁶⁵¹ With the creation of the Presidential Discretionary Fund (re-named by the people the "Presidential Slush Fund"), Chiluba endowed himself with resources taken away from the state budget. Every year the Auditor-General denounced the gross misuse and misappropriation in the Reports to the National Assembly of which the government was responsible. However, these reports received no follow-up.⁶⁵²

⁶⁴⁶ See Article 6 of the ICSECR.

⁶⁴⁷ See Article 9 of the ICSECR.

⁶⁴⁸ See Article 11 of the ICSECR.

⁶⁴⁹ See Article 12 of the ICSECR.

⁶⁵⁰ See Article 13 of the ICSECR.

⁶⁵¹ Applying the Ministerial and Parliamentary (Code of Conduct) Act No. 35 of 1994, the Chief Justice set up a tribunal to judge the case, which involved three Ministers; see "Finance Ministry Violated Privatisation Act over PHIT", *The Post*, 5th July, 2001.

⁶⁵² Chanda, *Governance and Human Rights*, cit.

The denial of social and economic rights is also due to the amount of foreign debt and the neo-liberal reforms imposed by the Bretton Woods institutions. As it has been stated, the external debt is “regularly serviced at the expense of vital social programmes” and “has already destroyed many of the social gains made in the 1960s and 1970s”.⁶⁵³ In 1992, the total external debt of Zambia was US\$ 3.7 billion. In 1998, it increased to US\$ 6.5 billion, 46 percent of which was owed to the World Bank, the IMF and the African Development Bank.⁶⁵⁴ The repayment of the debt absorbs resources, which could be used to finance social services. Thus in 1991, US\$ 107.8 million went to education and US\$ 73.6 to health. In 1996, education and health respectively received to 88.4 and 67.7 million.⁶⁵⁵ The neo-liberal structural adjustment policies that the Bretton Woods institutions have imposed on Zambia and that the Chiluba government accepted without any question have contributed further to the denial of social and economic rights. A study published in 2000 and conducted for the UN Committee on Economic and Social Rights reached the conclusion that “economic and social rights are increasingly denied and actively violated in Zambia”⁶⁵⁶ and that this is the consequence of the policies of privatisation and liberalisation, which constitute a central part of the reforms required by the Bretton Woods institutions to financially support the government of Zambia in its effort to redress the critical economic and financial situation facing the country. In fact, the Chiluba government immediately developed a Policy Framework Paper (1992-1994), which set out the parameters of its economic policy. The content of the Policy Framework Paper was heavily conditioned by the Bretton Woods institutions as the reception of financial assistance from the World Bank and the IMF was subordinated to their approval of the document. This was followed by the implementation of a structural adjustment programme, which involved the revision of the existing institutional and legal framework, and a macroeconomic stabilisation programme. The core elements of the SAP were the liberalisation of trade and industry, the privatisation of the parastatal sector and the rationalisation of the public sector. The macroeconomic stabilisation programme had a financial nature and was aimed at the reduction of inflation, the achievement of a balance of the government’s accounts and the rationalisation and consolidation of the financial sector.

⁶⁵³ *Joint Report of the Independent Expert on the Effects of Structural Adjustment Policies and the Special Rapporteur on the Effects of Foreign Debt on the Full Enjoyment of Economic, Social and Cultural Rights*. E/CN. 4/2000.51, 14th January 2000, para. 16.

⁶⁵⁴ *Ibidem*, para. 17.

⁶⁵⁵ M.J. Kelley, *Primary Education in Heavily Indebted Poor Country: The Case of Zambia in 1990s*, Oxfam and UNICEF, Lusaka, cited in table 1, in *ibidem*.

⁶⁵⁶ T. Kenny, *Zambia, Deregulation and the Denial of Human Rights*. Submission to the UN Committee on Economic, Social and Cultural Rights, Rights, Accountability and Development (RAID), Queen Elisabeth House, Oxford 2000, summary report at <http://www.rsc.ox.ac.uk/textweb/rzambia.html>

These reforms continued after 1994 during the whole period of the Chiluba government. Liberalisation brought a dramatic transformation in contrast with the Kaunda's era, as Zambia had previously been one of the most nationalised economies in Africa. The legal and institutional landmarks of the neo-liberal reforms introduced during the Chiluba government were the adoption of the Privatisation Act in 1992 and the creation of the Zambian Privatisation Agency (ZPA). The major outcome concerned the privatisation of the parastatal Zambia Consolidated Copper Mines (ZCCM), the core sector of Zambian economy, which was completed in 2000.

In fact the neo-liberal reforms introduced by the Chiluba government produced negative results also in economic and financial terms. While the domestic budget deficit has remarkably diminished, the amount of money owed to foreign banks, the World Bank and the IMF continue to be considerable. Moreover, the gross domestic product has not increased and foreign direct investment has been low, despite it being the goal of economic reform.⁶⁵⁷ The Zambian economy has clearly paid a high price. All forms of protection to Zambian goods have been curtailed to promote foreign trade. Subsidies, price controls and control on the quantity of imports allowed into the country have been removed and customs duties have been reduced. Moreover, foreign exchange regulations have been repealed in order for companies to freely introduce foreign money for investment and withdraw foreign exchange resulting from operations conducted in Zambia. Furthermore, in the same logic of attracting foreign investment, new legislation has been adopted to safeguard private assets against expropriation, individual and corporate taxes have been curtailed and capital allowance has increased. The local economy has been severely damaged by these policies. The level of imports overtook exports and the agricultural sector and the local manufacturing industry found themselves competing with foreign companies, whose products are cheaper and, unlike the Zambian ones, they can rely on subsidies and higher technology.

If one looks at the social costs of these measures, the picture is equally bleak. Privatisation and liberalisation have been carried out at the expense of Zambian economic activities and the balance in the domestic budget has also been pursued through drastic cuts in the social spending, which has worsened the health, education and housing conditions of Zambians.

The right to work has been seriously affected. Remaining in the framework of the Zambian Constitution, it could be argued that the directive principle (c) "to create conditions

⁶⁵⁷ Kenny, cit.

under which all citizens shall be able to secure adequate opportunity to obtain employment” has not been effectively pursued. Deregulation, privatisation and the accompanying rationalisation of the parastatal sector have brought about an extremely high percentage of job losses. Many state companies have been liquidated and, between 1992 and 1994, 25,611 workers, most of whom were employed in the public and parastatal sectors, were declared redundant.⁶⁵⁸ The decline in employment continued, in stark contradiction with the neo-liberal belief that the first necessary period of job losses would be followed by the creation of new employment by foreign investors. Between 1992 and 1998, 81,000 people lost their posts in the formal economy⁶⁵⁹ and the informal economy has grown as far as to absorb 85 percent of the economically active population.⁶⁶⁰ This means that the majority of workers in Zambia are outside the protection of the law, and therefore, the right to social security is also not guaranteed.

The situation generated by the implementation of the structural adjustment measures had a negative impact on the right of workers and their dependent families to “an adequate standard of living”, including adequate food, clothing and housing. The Zambian government has not created “the conditions under which all citizens shall be able to secure adequate means of livelihood” (directive principles (c)). Before the implementation of the structural adjustment reforms in 1991, 68 percent of Zambians lived in poverty. Today 85 percent of people live below the World Bank’s poverty threshold of one dollar a day.⁶⁶¹ Life expectancy has decreased from 51 years in 1981 to 40 years and six months in 1998⁶⁶² and in 2000, this dropped to 37 years,⁶⁶³ also because of the spread of HIV/AIDS.⁶⁶⁴

Moreover, the measures adopted by the government do not seem to be in line with either the state’s commitment “to provide decent shelter for all persons” (directive principle (d)). Privatisation of the parastatal sector has also affected the right to housing, as it provoked the displacement of a large number of families from mine land. All state housing has been

⁶⁵⁸ Central Statistical Office, *Quarterly Digest of Statistics*, First Quarter, Lusaka: CSO 1994 and *Economic Report*, National Commission for Development Planning, Lusaka, 1995. N. Simutanyi, “The Politics of Structural Adjustment in Zambia”, in 17 *Third World Quarterly*, 1996, p. 837.

⁶⁵⁹ EU Joint Service for the Management of the Community Aid to Non-Member Countries, Statistical Appendix, table 8, 1999 (data provided by the Government of Zambia’s Central Statistical Office), cited in Kenny, cit.

⁶⁶⁰ ILO Committee of Experts on the Application of Conventions and Recommendations, *Individual Observation 1999* concerning ILO Employment Policy Convention 1964 (No. 122).

⁶⁶¹ Central Statistical Office, *The Evolution of Poverty in Zambia*, 1997, cited in Kenny, cit.

⁶⁶² WHO, *World Health Report*, Statistical Appendix, Table 1, 1999, in ibidem.

⁶⁶³ See WHO data at <http://www.who.int/country/zambia/en>

⁶⁶⁴ Zambia is one of the countries most affected by the pandemic in sub-Saharan Africa. Around 20 per cent of the adults in Zambia are HIV positive. Data found in UNAIDS, *Epidemiological Fact Sheets on HIV/AIDS and Sexually Transmitted Infections*, 2002.

sold and the tenants have been evicted. Furthermore, with the privatisation of ZCCM, employees of the copper sector and their families have lost access to the social services and facilities, including the housing that ZCCM provided, as well as the permission to establish squatter settlements in the mine land. Moreover, as a condition for aid the World Bank called for the repeal of the provisions from the Industrial and Labour Relations Act requiring private employers to supply housing or housing allowances. The rationale was that these provisions constituted a disincentive for labour mobility and private housing development. Although many Zambian citizens supported this revision, the speed with which the new regime was introduced and the fact that it was implemented in a period of economic crisis deprived many households of any security. Donors have also pushed the Zambian government to convert customary land to leasehold status. In this regard, two acts were adopted subsequently as a response to pressure from the World Bank. These were the Land Act of 1995 and the Mines and Mineral Act of 1993 (amended in 2000). The Mines and Mineral Act recognises the right of mining companies to acquire land in customary areas upon consent from the Chief. This implies that an entire community may lose their land without being consulted.

Neo-liberal policies are also inconsistent with the State's undertaking "to provide equal and adequate educational opportunities in all fields and at all levels for all". The loss of employment has had an impact on the conditions of children and their right to education. The number of children enrolled in primary schools has dropped by 14 percent since 1986 and this is due in part to the fact that schooling is not free and many families cannot afford to send their children to school after having lost their jobs. The responsibility of the World Bank is considerable in this respect. The Bank has a very narrow approach vis-à-vis the right to education. It focuses on extreme poverty and it confines itself to promoting bursaries to reduce "cost barriers for the ultra-poor". The official discourse does not push for a guarantee for compulsory primary education to everyone, as provided by international human rights law.⁶⁶⁵ In a country in which over 600,000 Zambian children are orphans,⁶⁶⁶ the fact that education is not free constitutes a clear impediment for them. In 1996, 68 percent of orphans in rural areas did not go to school. Apart from the right to education, some other children's rights are violated including the right to an adequate standard of living and freedom from exploitation. The phenomenon of street children affects in Zambia at least 75,000 children

⁶⁶⁵ See the critique of the UN Special Rapporteur on the Right to Education, Annual Report, E/CN.4/2001/52, 11 January 2001, Commission on Human Rights, Fifty-Seventh Session, para. 35.

⁶⁶⁶ AFRONET, *Zambia. Human Rights Report 2001*, available at <http://afronet.org.za/>

below the age of 18.⁶⁶⁷ Most of these children, the majority of whom are orphans, have never gone to school or have left it to make a living. In this regard, it should also be taken into account that the phenomenon of child labour is also widespread. There were approximately 595,000 child labourers (between 5 and 17 years) in 1998 and approximately 85 percent were occupied in the worst forms of child labour.⁶⁶⁸ The government of Zambia has responsibilities towards children not only deriving from its ratification of the ILO Worst Forms of Child Labour Convention, 1999 (No. 182) and the ILO Minimum Age Convention, 1973 (No. 138), the ICESCR⁶⁶⁹ and the Convention on the Rights of the Child,⁶⁷⁰ but also from its constitution. As seen above, a provision included in the bill of rights is devoted to "Protection of young persons⁶⁷¹ against exploitation". Article 24 provides: "No young person shall be employed and shall in no case be caused or permitted to engage in any occupation or employment which would prejudice his health or education or interfere with his physical, mental or moral development, provided that an Act of Parliament may provide for the employment of a young person for a wage under certain conditions" (para. 1). Moreover "[a]ll young persons shall be protected against physical or mental ill-treatment, all forms of neglect, cruelty or exploitation" (para. 2).

In addition, structural adjustment measures also affected the enjoyment of the right to health and have hindered the fulfilment of the state's commitment "to endeavour to provide clean and safe water, adequate medical and health facilities" (Directive principle (d)). These measures have included a reduction of the funding of health institutions and the introduction of user fees. Combined with the high level of poverty, this has had a devastating effect on the health conditions of the population. Not only has average life expectancy dropped, but the incidence of infant mortality, stunted children, tuberculosis and HIV have also increased.⁶⁷²

Another aspect of the lack of implementation of the right to health is the reduced access to safe water. While in the early 1970s, 86 percent of the urban population had access

⁶⁶⁷ G. Lugnwangwa and M. Macwan'gi, *Street Children in Zambia: A Situation Analysis*, pp. 22 seq., cited in Kelly, and UNDP, *Zambia Human Development Report*, 1998.

⁶⁶⁸ ILO-IPEC and Republic of Zambia, Central Statistical Office, *Zambia 1999: Child Labour Survey*, Lusaka, Zambia, 2002. According to the ILO Worst Forms of Child Labour Convention, 1999 (No. 182) ratified by Zambia in 2001, the worst forms of child labour comprise all forms of slavery or similar practises; prostitution; pornography; illicit activities, in particular for the production and trafficking of drugs; work which is likely to harm the health, safety or morals of children. In 2001, Zambia also ratified the ILO Minimum Age Convention, 1973 (No. 138).

⁶⁶⁹ Article 10 (3) states: "The State Parties to the present Covenant recognize that... Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation".

⁶⁷⁰ G.A. Res. 44/25 of 20th November 1989, *entered into force* 2nd September 1990.

⁶⁷¹ The term "young person" signifies an individual under the age of fifteen years.

⁶⁷² See UNDP, *Zambia Human Development Report 1999/2000*.

to safe water, in 1996 the proportion fell to 8 percent. In certain areas, such as Copperbelt, the percentage of households relying on unprotected water sources has risen to more than twice that of the early 1970s.⁶⁷³ In 1978, there were 2,000 cases of cholera, whilst in June 1999, this figure had risen to 11,327.⁶⁷⁴

The Chiluba government recognised some of these problems due to the increasing pressures of civil society. However, its response was limited due to the strict requirements imposed by the World Bank. The government acknowledged the need to address the HIV pandemic and the phenomenon of child labour. With regard to the latter, for instance, it set up an inter-ministerial working group (the National Steering Committee of the National Country Program on Child Labour) in 2000 to coordinate the relevant initiatives. Moreover, it started addressing the problem of poverty in accordance with the World Bank's commitment to a "pro-poor growth". To this end, the government developed a Poverty Reduction Strategy Paper (PRSP) in 2002. This combines activities to promote growth with improved access to social services, including education, health services and access to water. However, a consideration of the employment-dimension of poverty continues to be lacking. The preceding analysis has shown the way in which the denial of the right to work has impacted on the current levels of poverty and on the violation of other rights such as the right to education and freedom from child labour. The privatisation and liberalisation policies carried out to date have not been questioned by the adoption of the PRSP's approach. With regard to the Interim Poverty Reduction Strategy Paper (I-PRSP), it was observed that it featured stringent macro-economic goals, "which are normally inserted in conventional structural adjustment programmes".⁶⁷⁵

9.3.2 Civil Society and the Donor Community's Role and Approach vis-à-vis Human Rights Promotion

Zambian civil society groups and donors, including the World Bank, have played an important role in the promotion of human rights in Zambia. However, significant differences exist regarding their respective approach to human rights and the Zambian government's reaction to the pressures coming from them. Zambian human rights NGOs have been very active in denouncing human rights abuses committed by the government. Their activities have

⁶⁷³ Living Conditions Monitoring Survey, 1996, table 14.7 quoted in Kenny, cit.

⁶⁷⁴ WHO, *World Health Report 1999*, quoted in Kenny, cit.

⁶⁷⁵ Report submitted by the Independent Expert on the effects of structural adjustment policies and foreign debt on the full enjoyment of all human rights, particularly economic, social and cultural rights. E/CN.4/2001/56, 18 January 2001, Commission on Human Rights, Fifty-seventh session, para. 42.

ranged from election monitoring, civic education and human rights promotion. Their presence on the Internet through their web-sites, support from and collaboration with international human rights organisations is an important component of their force and their ability to inform the public about the human rights situation in Zambia and to work towards its improvement. There are two key results achieved by Zambian NGOs (together with the media). The first involves drawing attention to the human rights violations occurring in Zambia both at home and abroad. Amnesty International and Human Rights Watch, for example, use AFRONET's reports as a source for their own reports on Zambia. The other result has been to curb the action of the government. Zambian NGOs actually play the role which has been traditionally played by opposition parties in liberal-democracies. Despite the repressive politics of the Chiluba government, NGOs have proved to be influential particularly when their action was supported by international pressure. For example, the withdrawal of the Media Council Bill and later, of the State Security Bill were due to the combination of internal and international action.

Donors have also exerted pressures on the government to end the restriction of individual liberties. However, donors and Zambian civil society concerns, however, do not always coincide and their influence over the government varies. The former have focused their attention merely on civil rights, while the latter have increasingly devoted their work to the status of economic and social rights. Donors, and also the media and international NGOs have disregarded the impact that the transition to a market economy has had to the enjoyment of social and economic rights.

Moreover, the Chiluba government has proved to be more sensitive to donors' pressures than to its own society's opinions. There are several examples in which donors' reactions have been a determining factor in influencing the government decisions. The 1997 state of emergency was lifted and a Commission of Inquiry on the cases of torture committed in that period was established to respond to donor pressure, in particular, the World Bank. The World Bank decided to postpone its Consultative Group Meeting⁶⁷⁶ in December, making it subject to the conclusion of the state of emergency and, later, conditioned the allocation of additional funds to the findings of a commission of inquiry. The appointment of the Human Rights Commission in 1997 was also a move taken to please the donors. The appointment of the members of the Commission took place on 4th April in order for the government to announce some news at the Consultative Donor Group Meeting in London on 25th April,

⁶⁷⁶ This includes governmental representatives and external aid partners.

which would have lowered donors' criticism of the 1996 elections, and to ensure the renewal of aid. The meeting was aimed at evaluating the status of the political reform and the human rights record of Zambia. The timing of the creation of the Commission and the fact that documents on the newly established Commission were distributed to donors but denied to Zambian human rights groups demonstrate that the appointment of the Commission was a political move addressed to foreign interlocutors and was not motivated by a genuine attempt to implement the constitutional provisions. The Commission was not even provided with its own premises or funds. What is interesting to recall is that these institutional and structural weaknesses have not prevented the Commission from exercising the role conferred on it by the law. In this way, institutions created only to respond symbolically to donors' concerns, may ultimately display an independence which was neither foreseen nor desired by the government.

The Chiluba government took other initiatives directed at meeting bilateral and multilateral donors' requests. After the lifting of the state of emergency, the World Bank Consultative Group has continued to call upon the Zambian government to take action on alleged human rights violations by the police. However, the continuation of financial support was only made conditional with regard to governance and macroeconomic reforms, with privatisation remaining the core condition. Progress in the sphere of human rights, democracy and governance appeared as conditions for future support.⁶⁷⁷ As a result, the government developed a National Capacity Building Programme for Good Governance and committed itself to improving human rights. It was certainly not a coincidence that the relevant document was only made public at the World Bank Consultative Group meeting in May 1999, where the Group announced its plan to make at least US\$ 240 million available in balance payment support and US\$390 million in project assistance conditional upon satisfactory economic and governance performance.⁶⁷⁸ During the meeting, reference was made to good governance, human rights and, in particular, freedom of the press. Moreover, the partners agreed that a "more coordinated, comprehensive framework and approach to development was needed". However, the privatisation of the ZCCM "*in whatever way it could*" and the implementation

⁶⁷⁷ See World Bank, *Zambia's Aid Programme Linked to Performance: Further Progress in Economic Reform and Governance Could Boost Support* at <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,contentMDK:20014734~menuPK:34466~pagePK:34370~piPK:34424~theSitePK:4607,00.html>

⁶⁷⁸ World Bank, *Zambia's Future Prosperity Linked to Continuing Reforms and Development of a Long-Term Vision*, News Release, at <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20015142~menuPK:34466~pagePK:34370~piPK:34424~theSitePK:4607,00.html>

of the economic reform program were the only concrete indications which emerged from the meeting. The core concern was the implementation of economic reforms regardless of the social implications they might have. Also the additional debt relief under the HIPC Initiative was subordinated to the realization of the economic reform programme. Only Scandinavian countries refused to release balance of payment support unless human rights and governance performance improved.

However, step towards the protection of civil rights was taken at the 1999 Consultative Group meeting. The Zambian government agreed to hold four pre-meetings with stakeholders before the meeting due to be held in Lusaka in May 2000. These four meetings should have been devoted to evaluating the implementation of the National Capacity Building Programme for Good Governance. After the meeting, however, it was clear that the openness shown by the government was in fact over. After returning from Paris, the Minister of Finance, Edith Nawakwi, and the government-controlled media attacked NGOs such as AFRONET and ZIMT for urging the donors to apply human rights conditionality to the balance of payment support. The same NGOs were also threatened with deregistration by the MMD chairperson for information and publicity, Vernin Mwaanga. However, when it became necessary again to satisfy donor concerns the government took up its previous commitments. In May 2000, the Minister for Legal Affairs, Vincent Malambo, convened a meeting with donors to provide feedback on the progress in the implementation of the National Capacity Building Programme for Good Governance, which had been partially revised. With the ten-year National Capacity Building Programme for Good Governance of 2000, the government committed itself to the principles of constitutional legitimacy, accountability, transparent decision-making procedures, participatory development, democracy, respect for human rights, gender equality and the rule of law. All of the fundamental key words of development agencies were included. The government also submitted the findings of the pre-consultative meeting with stakeholders on the National Capacity Building Programme.⁶⁷⁹ On the eve of the meeting with the Consultative Group, which was due to be held on 17th and 18th July, the government took other steps which were aimed at showing its commitment to human rights and good governance. For example, the Minister for Legal Affairs met with a few NGOs to decide upon their participation in the meeting with the Consultative Group.⁶⁸⁰

⁶⁷⁹ Many of the points raised concerned the strengthening of the Human Rights Commission, see *Report of the Consultative Process with Stakeholders held on the National Capacity Building Programme for Good Governance for Zambia*, Lusaka, Ministry of Legal Affairs, 8th October 1999.

⁶⁸⁰ As they were permitted to attend the meeting, a Steering Committee decided to produce papers on a wide range of subjects, including debt, poverty, governance and gender. The final version of these papers was then

However, human rights continued to be treated as an instrument in the relationships with the donors rather than a constitutionally binding commitment. This attitude was clearly manifested. On 16th July 2000 the government invited Zambian NGOs and Human Rights Watch to participate in a consultative group meeting on human rights and governance issues with bilateral donors in Lusaka. The same day, the police arrested a MP of the United Party for National Development (UPND) and nine constituency officials upon the charge of having held an unlawful meeting two days earlier.

In brief, donors played a crucial role in promoting human rights in Zambia. However, apart from situations of crisis, such as in 1997 when the state of emergency was declared, they did not make recourse to conditionality. In fact, the tolerance demonstrated by Western donors has been condemned by Zambian NGOs, which also demanded the withdrawal of financial support for the Government in 1998. For example, the Zambian Legal Resource Foundation (LRF) commented upon the commitment of over US\$500 million at the Paris World Bank Consultative Group meeting in 1998 and declared that “the donor countries are not helping Zambia to democratise or move steadily towards democracy”.⁶⁸¹

Other critiques concerned the content of the reforms promoted in Zambia. AFRONET denounced Zambia for its “continued implementation of neo-liberal structural adjustment policies” which “ran counter to the prospects of enhanced provision of economic, social and cultural rights”.⁶⁸²

In respect to this stand, it should be noted how the discourse and action concerning human rights has developed within civil society since 1991. Zambian civil society, including human rights organisations, civic associations, trade unions and business groups, has enlarged the scope of their human rights-related claims. The movement, which provoked the fall of the Kaunda’s regime, built its demand for change around the concept of democracy. Their demand had a social and economic rationale, however it was expressed with a request for civil and political rights only. A fieldwork study conducted in the early 1990s in a suburb of Lusaka showed that, at that time, the population equated democracy with the improvement of the existing living conditions. The author of this study remarked that for the population of this suburb the term democracy signifies food. Democracy “*c’est d’abord, pour les gens du quartier, des magasins qui ne sont plus vides*”.⁶⁸³ The second meaning attached to the concept

agreed upon in a National Forum of NGOs which was convened in Lusaka on 10th July.

⁶⁸¹ “Paris Club Meet: Who Is the Villain?”, in *Newsletter of the Legal Resource Foundation in Zambia*, Number 2, May-June 1998.

⁶⁸² AFRONET, Zambia. Human Rights Report 2001, cit.

⁶⁸³ J.P. Daloz, “Can We Eat Democracy?” Perceptions de la démocratisation zambienne dans un quartier

of democracy was the freedom of movement and expression. This conveys the expectation that through freedom, including economic freedom, the living conditions would improve, however, this has not yet been achieved. As argued in the preceding sections, this is partially due to the lack of good governance. However, this is also due to the fact that the MMD government has pursued neo-liberal policies without taking their social impact into account. As a reaction, civil society has begun to raise the issue of social and economic rights, which has been absent from the language used to make political claims in the late 1980s and early 1990s. In addition, during the consultation processes, which led to the amendment of the 1964 and 1991 constitutions, the proposals concerning socio-economic rights were marginal to the overall discussion. However, groups such as AFRONET, Women for Change, Transparency International-Zambia, Integrity Foundation, the Catholic Commission for Justice and Peace (CCJP), the Jesuit Centre for Theological Reflection (JCTR) and the Zambian Association for Research and Development (ZARD) are currently active in lobbying the government and raising awareness among the population with regard to socio-economic rights. In light of this recent development, all of the political parties, including the MMD, felt obliged to undertake commitments in this respect during the latest electoral campaign. All of the political manifestos contained promises for the free provision of social services, in particular in the sphere of health and education, and employment creation. Despite its weaknesses, the preparation of the PRSP by the Ministry of Finance and Economic Development gave a further boost to the concern about the social deficits of the policies carried out by the government until this point. A common criticism of the civil society groups relates to the social impact of the structural adjustment policies imposed by the World Bank and the IMF. The donor-driven nature of Zambia's policies is also questioned.⁶⁸⁴ The demand for the government to distance itself from the IMF has been expressed not only by the trade union movement, but also by the business community. For example, the executive secretary of the Zambia Chambers of Small and Medium Business Association, Maxwell Sichula, has attributed massive job losses and the growth of the informal sector to the hasty implementation of liberalisation and privatisation.⁶⁸⁵ Recently the proposed privatisation of

populaire de Lusaka", in J.P. Daloz and P. Quantin (eds.), *Transitions démocratiques africaines: Dynamiques et contraintes (1990-1994)*, Ed. Karthala, Paris, 1996, p. 250.

⁶⁸⁴ AFRONET, Zambia Human Rights Report 2001, cit. Recently, the President of the University of Zambia Lecturers and Researchers Unions (UNZALARU) has also taken position against donor-driven policies, see "Zambians should be firm in order to succumb to outside pressure", in *The Monitor*, Friday, 20th December 2002. For a similar position by the Zambia Congress of Trade Union (ZCTU) Deputy Secretary Ian Mkandawire, see "ZANACO sale bid on course-IMF", in *Times of Zambia*, Friday, 20th December 2002.

⁶⁸⁵ "Ills of privatisation, liberalisation cited", in *The Monitor*, Tuesday, 24th December 2002.

the Zambia National Commercial Bank (ZNCB), the Zambia Telecommunications Company (ZAMTEL) and the Zambia Electricity Supply Corporation (ZESCO) was criticised by NGOs, the Church, MPs and the labour movement in the light of the hardship that the previous privatisations have created. Responding to this widespread opposition, the Parliament turned down a motion to privatise these companies in December 2002. President Mwanawasa confirmed this decision and said to the IMF that in light of the high levels of poverty, asset stripping and job losses that privatisation has caused in Zambia, he wanted to re-consider the privatisation programme of ZNCB, ZAMTEL and ZESCO. This would have represented a substantial change in the government's attitude towards international financial institutions, if the President had maintained this position. Conversely, later, he did not oppose the continuation of the privatisation programme also given the pressures from the IMF, which had subordinated the cancellation of almost half of the country's debt to the implementation of the agreed privatisation programme. However, the fact that the policy line of the IMF was questioned not only by the Parliament but also by the Government and that the President was severely criticised by the Media, politicians and civil society's groups for not having behaved consistently with his previous declarations show that Africa is starting developing a less passive approach to external conditionalities which have human rights costs.

CHAPTER 10: Francophone Africa

In contrast with English-speaking Africa, this new constitutional phase presents some clear patterns in Francophone Africa. Firstly, almost all of the French-speaking countries adopted new constitutions.⁶⁸⁶ Secondly, it is possible to identify two specific processes through which constitutional change was brought about. In certain countries, political liberalisation and the process of constitutional renewal started on the initiative of the heads of the states themselves, who realised that it was the only way to ensure their political survival in light of the a popular discontent which needed to be addressed. This was the case of Côte d'Ivoire,⁶⁸⁷ Mauritania, Burkina Faso, Comoros,⁶⁸⁸ Cameroon and Madagascar. In other countries, the political renewal was realised through the holding of National Conferences, in which the various political, social, professional and religious voices met and discussed the transition to democracy. Most of these Conferences declared themselves as sovereign and adopted new constitutions. This model was inaugurated by Benin and was then imitated, with different results,⁶⁸⁹ by some of the other former French colonies, including Gabon (March-April 1990), Congo (February-June 1991), Togo (July-August 1991), Niger (July-November 1991),⁶⁹⁰ Mali (July-August 1991) and Chad (January-April 1993).⁶⁹¹

In all of these conferences, the discussion of the constitutionalisation of fundamental rights and freedoms was a central concern. This was reflected in the texts of the constitutions, which contain a very detailed list of rights drawn from the International Bill of Rights and the African Charter. Unlike the independence constitutions, those adopted in the 1990s ensure the enforceability of human rights either through the inclusion of protective provisions in the body of the Constitution⁶⁹² or, when human rights are incorporated in the preamble, it is specified that this is an integral part of the constitution.⁶⁹³ Another difference relates to the sources of the constitutional protection of human rights. These no longer refer to the 1789 French Declaration or the preamble to the 1946 French Constitution, but rather to the

⁶⁸⁶ Burkina Faso in 1991, Capo Verde in 1992, Central African Republic in 1995, Chad in 1997, Republic of Congo in 2002, Djibouti in 1992, Equatorial Guinea in 1991 (amended in 1995), Gabon in 1991, Guinea in 1991, Madagascar in 1992 (amended in 1998), Mali in 1992, Mauritania in 1991, Niger in 1999, Seychelles in 1996 and Togo in 1992.

⁶⁸⁷ After the revision of the 1960 constitution in 1990, a new constitution was adopted in 2000.

⁶⁸⁸ Comoros achieved independence in 1975.

⁶⁸⁹ See D. Bormaud et P. Quantin, "Le modèle et ses doubles : les conférences nationales en Afrique Noire (1990-1991) ", in I. Mény, *Les politiques du mimétisme institutionnel. La greffe et le rejet*, L'Harmattan, Paris, 1993, p. 163 seq.

⁶⁹⁰ A new constitution was subsequently adopted in 1999.

⁶⁹¹ A new constitution was subsequently adopted in 1997.

⁶⁹² See for example Title 2 of the Constitution of Benin (1990), the Preliminary Titles of the Constitutions of Niger (1992), and Gabon (1991), or Title 2 of the Constitution of Madagascar (1992).

⁶⁹³ For example, the Constitution of Congo of 1992.

international human rights regime and the African Charter and more generally to the developments which occurred in the international discourse on human rights, as expressed not only through legal instruments but through the broader spectrum of international conferences and civil society action on human rights. Thus, these new constitutions protect not only civil and political rights, together with social, economic and cultural rights, but also 'third generation' rights such as the right to a healthy environment and even the rights of special groups, including people with disabilities or the elderly, similarly to the Beninese constitution. Moreover, in some constitutions such as the ones of Benin and Burkina Faso, which followed the Beninese model, provision is made for a Constitutional Court with the task of checking the constitutionality of laws. Many of these constitutions also include Human Rights Commissions as well as administrative authorities charged with the task of guaranteeing the respect for the freedom of the press.

10.1 Benin: the 1990 Constitution

10.1.1 Processes and Actors Heading to the Adoption of the 1990 Constitution

The fall of the Kérékou regime, which preceded the adoption of the 1990 Constitution, was the outcome of the mobilisation of Beninese civil society and later supported by external actors, including the World Bank, IMF and France. The international context characterised by the reforms introduced by Gorbachev in the Soviet Union also contributed indirectly to the democratic shift by depriving the regime of its political and ideological reference and encouraging the Beninese to continue their struggle for democracy. The term 'perestroika' was even employed by the Beninese movement to define its demands for change.

The factor which sparked the process of change was the serious crisis of the regime, whose roots lay in its inability to guarantee acceptable living conditions for its population. From 1979, the country faced a bleak financial and economic situation characterised by trade and budgetary deficits and decreasing exports, which was similar to the pre-coup period. Even though external causes contributed to this situation, much of the responsibility was due to the widespread corruption, a growing and unproductive public sector⁶⁹⁴ and the crisis of the banking system determined by the transfer of a considerable amount of funds abroad, which culminated in the failure of the Central Bank of Benin in 1989. This situation was placed in a context of systematic and brutal repression of any opposition. The "institutionalisation"⁶⁹⁵ of

⁶⁹⁴ C. Allen, "*Democratic Renewal in Africa: Two Essays on Benin*", Occasional Paper No. 40, Centre of African Studies, Edinburgh University, 1992, p. 5.

⁶⁹⁵ F. Laloupo, "La Conférence nationale du Bénin: Un concept nouveau de changement de régime politique", in

imprisonment and torture was a striking feature of the pre-1990 Kérékou era.

The economic and financial condition of the country increasingly worsened. The cautious reforms introduced in the 1980s proved ineffective especially given the international terms of trade which penalised African producers, and the refusal of the IMF to provide a structural adjustment loan. If the late 1970s witnessed a fall in the real income of workers and peasants, in 1986, the salaries of public sector workers were paid late and many jobs were lost. In 1988, salaries and student grants went unpaid at all and the accounts of thousands of civil servants and teachers were frozen. Finally, these events culminated in a widespread revolt.

However, seeds of this revolt can be found at the end of the 1970s, when protests against the regime began to be organised although the majority of the population tended to manifest its opposition through forms of passive resistance, such as abstaining from voting. Only unofficial student organisations and unions, which were mainly connected with the Communist Party of Dahomey (PCD) dared to take overt action against the regime, and this opposition was brutally oppressed with arrests, torture and murders. In the mid 1980s, opposition became increasingly overt. This was due to the fact that the state could not use the methods employed to calm the discontent such as clientelism, co-optation and patronage. Notably, since the beginning of the 1980s, the regime was no longer capable of replicating this system, therefore it lost the support of those who once relied upon it. In 1986, the situation was so critical that the practice of offering public employment to each graduate had to be stopped. At the same time, the size of the mass of people who were co-opted was so great that they tended to escape from the control of the regime and to claim new means of access to power and accumulation.

The year 1985 marked the beginning of the end for the regime. In this year, the students organised protests demanding jobs and an independent student union. Other demonstrations were held in 1987 and 1989 despite the brutal repression that they faced. However, it was from 1988 and above all in the period from 1988-1989 that opposition to the regime took the form of a real popular mobilisation. This was also due to the worsening of the economic situation. Austere measures such as the halving of the indemnities to teachers in 1987 and the delay of the payment and reduction of the salaries between 1987 and 1988 further intensified the anger of the people. In January 1989, students organised a strike which lasted for one week in the university campus of Cotonou as the grants for the previous term

had not been paid. By mid-January, most high schools were closed and for the first time, the teachers joined the students in the struggle. They even refused to go back to school when they received two months salary and they demanded the full amount that was due to them. The strike ended only when the Council of Ministers announced that all of those who were not at work by 31st January would be dismissed. In the meantime, the ministerial civil servants also went on strike. A situation dominated by banking scandals, the freezing of bank accounts, the persistent block of the payment of salaries and trials for the attempted coups in 1988 encouraged other groups to mobilise. In the months from March to July 1988, teachers, plantation workers, medical workers in Porto Novo and civil servants went on strike for the payment of salary arrears. The demands became more forthright when they saw that the government reacted with repressive measures, instead of engaging in a dialogue. It was only rural masses that did not participate in the mobilisation against the regime and this was due to the fact that they found alternative means to survive by turning the production into food production and by making recourse to smuggling with Nigeria.

In parallel to the urban demonstrations, the IMF, the World Bank and France pressed the regime to introduce political reforms, allegedly urging the government to introduce multipartism, reject Marxism and respect human rights.⁶⁹⁶ The "interest" of the Bretton Woods institutions in Benin dated back to 1985 as the government had refused to agree on a structural adjustment programme with the IMF at this time. Nevertheless, to meet the demands of the international community it decided, to partially liberalise the system by allowing the private press to exist, even though it was subjected to censorship. It is at this time that the *Gazette du Golfe*, *Tam-Tam Express* and *L'Opinion* appeared. The regime also accepted to strengthen the practice of the '*concertation*' with the trade unions. Under the pressures from the World Bank and the IMF, the regime also agreed to start an inquiry on the funds transferred abroad from the *Banque Commerciale du Bénin* by Beninese and French officials of the judicial administration. Some 80,884,000 French Francs were transferred to European banks and the charges were addressed to a Minister who was very close to Kérékou, Mohamed Cissé. In 1988, the World Bank encouraged further steps towards liberalisation and France conditioned its aid to Benin on the consultation with the World Bank and the IMF. The appointment of the attorney and law professor Robert Dossou was a concession made by the regime to the requests for the liberalisation of the system. Finally, in June 1989, the regime gave in and signed an IMF structural adjustment programme. In the same year, an amnesty for

⁶⁹⁶ Allen, Goodbye, cit., p. 11.

all political prisoners was voted upon and Kérékou undertook to liberalise various sectors of the economy, justifying these steps as “*une étape indispensable dans le parcours de la révolution*”.⁶⁹⁷ In the meantime, France continued to sustain the regime by supplying aid in order to allow it to pay the salary arrears of public officials and the army. The French attitude provoked the opposition of the Beninese people. In September 1989, several letters were sent to the Elysée protesting against the policy of France towards the regime of Kérékou. In the meantime, the events taking place in Eastern Europe reinforced the struggle of the Beninese. In Paris, several meetings were organised by the Diaspora, to which the heads of state were invited, and various “*clubs de réflexions*” were formed. The impact of the events taking place in Europe was clearly evident from one of the publications (Bulletin d’Etudes Perspectives et Projets) of these clubs. Furthermore, as the sociologist Cosme Zinsou Quénou wrote: “*En quoi la crise romaine, par exemple, diffère-t-elle de la situation béninoise?*”.⁶⁹⁸

This overview shows that the factors which undermined the regime were the economic and financial crisis, which led to the regime’s “politics of the belly”⁶⁹⁹ and the resurgence of civil society. Most analysts recognise that civil society played a major role in the fall of the regime. There are two salient features of this popular mobilisation, namely the breadth of the social actors involved and the evolution of its discourse. This mobilisation included various social groups and developed a political consciousness which was not apparent from the onset. As argued above, Benin’s civil society activism in the years between 1989 and 1990 was not a sudden phenomenon.⁷⁰⁰ The actors which led the protests in this period had also opposed the regime in the previous years. In this way, these movements should be seen in a historical perspective, and over the years, and even in that period, Benin witnessed a political evolution of its civil society.

If we look more closely at the different segments of the Beninese civil society, that were opposed to the regime, we can see that the leading role was played by the PCD, the students movement, the trade unions in the public service sector, the Catholic Church and catholic intellectuals and, finally, by the Diaspora and the opposition in exile. The PCD, which operated clandestinely until 1991, was the only movement until 1990 to overtly oppose the regime in the rural areas. It organised forms of passive resistance of the population such as the non-payment of taxes, it removed local representatives by force and organised elections to

⁶⁹⁷ Laloupo, La Conférence nationale du Bénin, cit., p. 97.

⁶⁹⁸ Ibidem, p. 99.

⁶⁹⁹ J.-F. Bayart, *L’État en Afrique. La politique du ventre*, Paris, Fayard, 1989 (English translation, Longman, 1993).

⁷⁰⁰ See Banégas, *Mobilisations sociales*, cit., pp. 25-44.

replace them. The PCD also had a few leaders in the state apparatus and activists in the university and thus, it could also exert its weight in the public sector strikes and in the protests in the university campuses.

The student movement has also had a long history. Since the 1970s, students had manifested their discontent against the regime. The student mobilisation was transformed in the mid 1980s due to a new political awareness. After an initial period of support for the regime in the aftermath of the coup of 1972, when the regime allocated posts in ministries and legalised the *Union générale des étudiants et élèves du Dahomey* (UGEED), students organised strikes and rallies, in which the most radical groups demanded a “*véritable révolution*.” Behind this mobilisation there was disagreement with certain decisions of the regime, which included the reorganisation of the schooling system and the frustration caused by the failure to pay salaries and grants. After the brutal repression of 1974, student mobilisation reappeared in 1979, albeit to a rather limited degree. The non-payment of salaries and grants was again the cause of these protests. However, once the salaries began to be regularly paid, the demonstrations ceased. According to Béatrice Gbado, a teacher who participated in the mobilisation against the regime, the turning point came on the 6th May of 1985, when students demanded better school services and the reintroduction of the automatic grants.⁷⁰¹ The situation remained tense for at least a month as the regime responded with the closure of the schools, the arrest of the leaders of the protest and the revocation of the Minister of the Education who attempted to engage in dialogue. The rest of population, however, remained indifferent to these events because salaries were being paid at the time. With the strike of 6th May 1985, nevertheless, some changes appeared in respect to previous demonstrations. Firstly, there were more students involved than in the past. Secondly, the new leaders of the *Bureau exécutif national de la coopérative universitaire* composed of the leaders of the 1979 movements, who had been released from prison, broadened their traditional scope of action and claims. They adopted a programme of reform of the university and organised meetings. These new initiatives were accompanied by a previously lacking political awareness. The concept of rights and pluralism emerged and for the first time an alternative system was demanded. Students affirmed that they realised that “*on peut mettre en œuvre des principes différentes pour gérer l’université et, au de-là, la société toute entière*”⁷⁰² and praised the principle of pluralism, thus distancing themselves not only from the regime but also from the only organised opposition force, i.e. the Communist Party. At the elections

⁷⁰¹ B. Gbado, *En marche vers la liberté*, Tome 1, Cotonou, 1990.

⁷⁰² Quoted in Banégas, *Mobilisations sociales*, cit., p. 33.

of 18th June 1989, students openly stated their rejection of the PRPB candidates.

A similar evolution took place within the trade union movement of the civil servants, which was another crucial actor in the collapse of the regime. As in the case of students, trade unions also supported the regime in the immediate aftermath of the coup. However, in the years between 1988 and 1989, trade unions, such as the *Syndicat National de l'Enseignement Supérieur* (SNES) and the *Syndicat National des Postes et Télécommunications* (SYSAPOSTEL), began putting forward not only salary claims but also demanding more autonomy and even the ending of their affiliation with the single trade union, i.e. the *Union nationale des syndicats des travailleurs du Bénin* (UNSTB). They actually managed to make the majority of trade unions autonomous, starting with the teachers' unions, and, in 1990, they set up the *Confédération des syndicats autonomes* (CSA-Bénin). Its establishment was preceded by the organisation of structures parallel to the official one such as the "*bureau de liaison*" and the "*comités d'action*" and networks of unions. Therefore, the teachers' unions went through an experience similar to that of students. The experience of self-organisation triggered off a process of awareness raising. Workers began to appreciate the value of pluralism and the need to reform the political system.⁷⁰³ According to Beatrice Gbado in 1989 "*à la lutte matérielle venait s'ajouter le combat moral*".⁷⁰⁴ The struggle was not only for the payment of their salaries but also to put an end to an unjust system that offered privileges to a few and hardship, arrests, killings and torture for the others. From this point, the cessation of all measures of repression and also the freedom to organise became an integral part of the package of workers' claims.

Challenges to the regime came also from within the state apparatus. During a meeting on 28th July 1989 with Kérékou, two university professors, one of whom was Robert Dossou Dean of Law of the National University and member of the Assembly, advocated that a precondition for sorting out of the dramatic economic situation was political liberalisation. They argued that citizens would only accept sacrifices to improve the economic situation of the country, if they felt free. Even dissent emerged within the army and corruption, authoritarianism and clientelism were denounced. A two-party system was demanded by army representatives in the PRPB.

Concepts such as freedom, injustice, human rights became key words in the citizens' mobilisation. In an open letter of the *Collectif des professeurs des enseignements moyens*

⁷⁰³ C. Allen, "Restructuring an Authoritarian State. Democratic Renewal in Bénin", in 54 *Review of African Political Economy*, 1992, p. 48.

⁷⁰⁴ Gbado, cit., Tome 1, p. 11.

général technique et professionnel (EMGTP) des provinces de l'Atlantique, de l'Oueme et du Mono, addressed to Kérékou on 28th July 1989, it was stated that a “*vive protestation contre ces arrestations, illégales, arbitraires et injuste qui constituent une violation flagrante des Droits de l'homme*”⁷⁰⁵ had been put forward. In this letter, they also denounced the limits imposed on the free movement in the country. These limitations were defined as “*un grave atteint aux libertés individuelles*”. In addition, they subordinated the resumption of their work to the government's fulfilment of a series of requests, which were organised under two categories: “*exigences morales*” and “*exigences matérielles*”. The former included the liberation of all of those illegally arrested, the guarantee of the freedom of speech, press, correspondence, assembly, association and manifestation as indicated by Article 134 of the Constitution. By the end of the year, mass rallies were held in several towns and the key claims concerned human rights and economic sovereignty.⁷⁰⁶

The Communiqué of the SYNESTP of 24th February 1990 should be noted as it displays a sophistication of language and thought, which was previously absent. This time, the requests were defined in terms of social and political claims. Moreover, the document made a strong claim that Africans had the right to enjoy democracy and human rights to the same extent as other continents in the world. The fact that this claim was put forward in opposition to what was judged as a tolerant position of Europe in respect to the Kérékou's regime marked a turning point in the history of Benin. A document widely circulated among the population had shown that France had recommended that Kérékou should simply revise the Constitution and open the Party to “*toutes les sensibilités politiques du pays*”. Teachers denounced these recommendations as a violation of the right to self-determination of the people of Benin.⁷⁰⁷ It is important to emphasise that the right to self-determination was not invoked to claim an African right to pursue a political path different from the West. Conversely, the teachers objected to the French government's perception that democracy should not be the same in the West and in developing countries. The Beninese people demanded a universalistic interpretation of democracy. The conclusion of the SYNESTP's document is clear in relation to the state model they wanted. It culminated with the declaration that the deep aspiration of the people of Benin is freedom and democracy. The document specified that this involved the establishment of a society in which political pluralism is ensured immediately and the right to

⁷⁰⁵ Quoted in *ibidem*, p. 72.

⁷⁰⁶ C. Allen, ‘*Goodbye to All That: The Short and Sad Story of Socialism in Benin*’, Occasional Paper, Centre of African Studies, Edinburgh University, 1992, p. 10.

⁷⁰⁷ At the same time students did not favour the signature of the structural adjustment programme with the IMF because it was interpreted as a transfer of sovereignty.

education, health and work would be guaranteed later on. In sum, the most politically sensitive section of Beninese civil society clearly and strongly affirmed that African distinctiveness should not be alleged to avoid the implementation of civil and political rights and that once liberal-democracy had been firmly introduced, social rights would also to have be guaranteed in order to ensure "*la survie prolongée de notre peuple*".

The Catholic Church also played a role in the democratisation process of the country, albeit to a smaller extent than students and trade unions. In the aftermath of the coup, the Catholic Church was subject to a harsh repression to which it reacted with passive resistance. It attempted to provide the population with structures alternative to those of the regime, including dioceses, developmental NGOs, vocational centres and centres for the promotion of women. However, until the 1980s, the Catholic Church never directly challenged the regime. It was only after the Pope's visit to Benin in 1982 that Archbishop De Souza began to openly criticise the regime in his sermons. This gave him a political role. In 1985 following the student protest, De Souza was received by the President as a mediator. However, it was only in 1989 that the Church took on a political position with the publication of the first of a series of pastoral letters. The language used in the letters is very cautious, referring to responsibilities shared by everyone, but they nevertheless highlighted corruption, clientelism and demanded democratic change. The voice of the Church, albeit prudent, added further weight to the opposition movement. Behind the position of the Church, the inspiration of catholic intellectuals was also present, who had increased their initiatives from the mid 1980s. Several religious organisations were created, where political discontent was increasingly manifested. The turning point came with the formation of the Group Syrius, then re-denominated Club Perspective 21 (CP 21), which was composed of high cadres also engaged in other groups, such as political parties, NGOs and trade unions. Trade unionism, structural adjustment, human rights and democratisation were among the subjects discussed.

In parallel to the Church, the press also contributed to the awareness raising of the population on the responsibilities of the regime for all of the sufferings that they had been going through. As seen above, in order to obtain international aid, Kérékou liberalized the press in 1988 and newspapers such as *La Gazette du Golfe* and *Tam-Tam Express* appeared and did not hesitate to attack the government particularly over instances of corruption. The tradition of a free and critical press that the country enjoyed during the colonial era along with the articles by the nationalist leaders reappeared in Benin.

Finally, the opposition in exile also played a role in the transition to democracy and published various materials and organised networks and committees in African countries,

including Côte d'Ivoire, Senegal and Gambia. However, their influence was weak and they did not receive much attention in Benin. The Diaspora was more influential through its financial contribution to the opposition movements. It was not until the formation of the new government that the exiled received a more prominent role.

10.1.2 La Conférence des Force Vives

By the end of 1989 the regime found itself under growing pressure from the population and also under the requirements imposed by the SAP. Against this background, the Central Committee of the PRPB, the Permanent Committee of the National Assembly and the National Executive Council met on 7th and 8th December and decided to abandon Marxist-Leninism as the official ideology of the country and gave the President the responsibility of convening a national conference *"regroupant les représentants authentiques de toutes les forces vives de la nation, quelles que soient leur sensibilités politiques, afin qu'ils apportent leur contribution, dans l'avènement d'un renouveau démocratique et au développement d'une saine ambiance politique nouvelle dans notre pays"*.⁷⁰⁸ According to the final communiqué, the results of this Conference would have been used to draft a new constitution. The decision to convene a national conference was also conditioned by a 'note' from France, which was communicated by the Director of the Civil Cabinet of the President to Kérékou. This note contained a series of 'indications' relating to the reforms to be carried out. These included the revision of the Constitution; the summoning of a *"convention nationale ou d'états généraux, ou d'assises nationales"*; an express reference of the separation of the Party and the State in the framework of constitutional revision; the holding of a party congress, *"qui à déterminer des modalités nouvelles devant permettre d'accueillir au sein de ses structures toutes les sensibilités politiques du pays"*; the determination of the modalities of convening and functioning of the *"Commission nationale de vérification des biens"* in respect of which the assistance of the World Bank was defined as *"une excellente chose"*. Finally, France expressed its willingness to provide aid to fund the political activities linked to the implementation of these reforms, in particular, to the holding of the national conference.

Unexpectedly copies of this document were freely circulated and were published in the newspapers. The public and the PCD in particular, reacted badly to what was perceived as an act of interference by France, which simply suggested the creation of a more open regime, but did not question the regime itself. In fact, France did not even make reference to issues such

⁷⁰⁸ Cited in R. Dossu, "Le Bénin: du monolithisme à la démocratie pluraliste, un témoignage", in Conac, *L'Afrique en transition*, cit., p. 185.

as multipartism or democracy.

With Decree No. 89-434 of 18th December, the President established a *Comité nationale préparatoire de la Conférence nationale* composed of eight members, only one of whom was a member of the single party. This Committee had the task of organising the Conference, devising the programme and elaborating on the basic document. The first task consisted of the determination of the “*sensibilités politiques*”, in order to decide who should be invited to the Conference. In order to make the Conference truly representative, the Committee decided to invite all of the known organisation. Almost five hundred persons from different social strata and organisations participated in the Conference, including peasants, workers, civil servants, political parties, NGOs, women’s organisations, the army, trade unions, Beninese diplomatic missions abroad, religious leaders, the Beninese Diaspora, individuals who had held prominent positions at domestic or international level, including all of the former heads of states. The PRBP had the same number of delegates as the other political organisations. The PCD only refused to participate.

The *Conférence des forces vives* was held from 19th to 28th February, lasting three days more than what was originally envisaged. Before the start of the Conference, the Committee received various documents from both within the country and abroad, containing an analysis of the present political, economic, social and cultural organisation of Benin and suggestions for the future. These documents were collected by the Committee and made available to the Conference. Moreover, they were used by the Committee to prepare four documents on education, economy, justice and human rights, and national political life since 1960. The opportunity given to everyone to transmit their documentation had a twofold advantage. Firstly, it informed Kérékou of the opinion of the people of Benin. In addition, it had the value of allowing the delegates “*de se «défouler»*” before the Conference started, as Dossou, the chairman of the Committee, has stated.⁷⁰⁹ This was the first occasion in which the people could freely express themselves without fear of repression. Hundreds of letters from individuals and organisations were received, the majority of whom were calling for liberal-democracy.

The delegates elected a presidium which was chaired by Isidore de Souza, whose contribution to the success of the Conference was recognised by everyone. He was distinguished for his balanced approach and spirit of conciliation. Furthermore, he gave the Conference a sense of spirituality, which emphasised the historic mission that all of the

⁷⁰⁹ Ibidem, p. 193.

participants had undertaken. Three commissions were formed, for the following areas: “*affaires constitutionnelles*”, “*affaires économiques et sociales*” and “*éducation, sciences, cultures, sport et environnement*”. The work of the Conference was consistently reported in the media and followed with great interest by the population.

In the beginning all of the participants were quite sceptical regarding the outcome of the Conference, also remembering the failure of the *Conférence des Cadres* of 1979 when the conclusions reached in favour of the reintroduction of a liberal democratic system were not applied. This scepticism was well-founded because the intention of Kérékou was to merely discuss the economic and social situation and to find a solution to the problems which were gripping the country. He declared that the task of the Conference was to reach a consensus that would be expressed in a national charter, and would constitute the basis of a future constitution grounded on democratic principles. The national charter was supposed to conform to the principles of economic liberalism included in the programme of structural adjustment of the IMF.

The atmosphere at the Conference was tense. Members of the regime tried harshly to resist the requests of the delegates and more generally to prevent the abuses and failures of the regimes from being discussed. Foreign interventions did not help the development of the Conference. The third day of the Conference, during a trip to Benin, Jacques Chirac declared: “*Le multipartisme, rien à voir avec l’Afrique*”. Despite this internal and foreign resistance to change and the threatened coup d’état by Maurice Kouandété, the leader of a coup in the 1960s, the delegates continued to work and became even braver in their requests. Seeing how the regime was willing to cede to the international pressures for economic liberalisation, but was unwilling to accept political liberalisation, the Conference challenged the President and obtained the recognition that the Conference and not the government was sovereign and entitled to adopt both binding decisions and remove the government from office. The proclamation of the sovereignty of the Conference was included in the *Déclaration sur les objectifs et les compétences de la Conférence*, which was adopted on 25th February. This document contained two important recommendations. The first related to the nature of the state that the delegates wished to establish, which would be founded on the values of democracy and human rights. The Declaration proclaimed its “*volonté d’instaurer la démocratie et le respect des Droits de l’Homme et des libertés fondamentales et de promouvoir le progrès économique et social*”.⁷¹⁰ The second recommendation was that the

⁷¹⁰ Published in *Les Forces Vives de la Nation. Documents fondamentaux*, ONEPI, Cotonou, 1990, pp. 15-18.

Conference would adopt a "*charte d'union nationale*", which would constitute the basis for the elaboration of a new constitution. Unlike the suggestion of Kérékou, this would be drafted by a commission appointed by the Conference working "*en toute indépendance vis-à-vis des structures de l'Etat*" and the constitution would be submitted to referendum. Finally the Conference would appoint an "*organisme nationale de suivi*" charged with supervising the transition process and the establishment of the institutions of the new Republic.

Kérékou appeared decided not to recognise the decisions of the Conference and to declare that the Conference was null and void. However, after a conversation with de Souza, Kérékou unexpectedly agreed to implement all of the decisions of the Conference. Thus, on 28th February the Conference elected Nicephore Soglo, a former World Bank official and former Minister of Finance (1965-66), as prime minister against Kérékou's preference for the appointment of Adrien Houngbedji. The whole government was deposed, however Kérékou remained President for the transitional period which was supposed to last for eleven months, although he was deprived of many of his powers.

The following section will examine some of the reasons for the success of the National Conference. This was due to the strong presence of civil society, which remained alert despite the repression of the regime. As Heilbrunn has underlined, an important element was the associational activism of Benin's civil society in the form of trade unions, students associations, organisations of retailers.⁷¹¹ This played a twofold role. In the first place, it provided the Conference with organised groups who already had defined platforms for their political claims. In the second place, it provided the Conference with people who were already familiar with what Heilbrunn has defined as "bargaining in an organisational context". Similar to all developments that occurred in sub-Saharan Africa in the early 1990s, the transition to democracy in Benin is also linked to external factors and Kérékou found himself completely isolated. France did not provide him with any support, unlike what it had done with Eyadéma in Togo. Furthermore, international donors did not supply him with aid because the scarce natural resources of the country did not make Benin an "interesting" country for them. The success of the Conference was, therefore, due to both the political maturity of Beninese civil society and the lack of any external (political or financial) support to the regime, which could have helped it to perpetuate itself or at least attempt to do so.⁷¹² In the absence of external assistance, the regime could not expect to survive.

⁷¹¹ J. Heilbrunn, "Social Origins of the National Conference in Benin and Togo", in 31 *The Journal of Modern African Studies*, 1993, pp. 277-299.

⁷¹² See K. Nwajiaku, "The National Conferences in Benin and Togo Revisited", in 32 *The Journal of Modern African Studies*, 1994, pp. 49-447.

10.1.3 The Interim Government and the Constitution-Making Process

A Commission charged with drafting the constitution was soon appointed. Moreover, a *Haut Conseil de la République* (HCR) headed by Archbishop de Souza and composed of the former Presidents of States and Conference delegates was set up with the task of controlling the follow-up of the decisions of the Conference, exercising the legislative function, controlling the executive, studying the amendments received after the popularisation of the draft of the constitution, supervising the legislative and presidential elections, approving the draft of the constitution, ensuring the equitable access of political parties to mass media and guaranteeing the defence and promotion of human rights as laid down in the African Charter of Human and People's Rights.⁷¹³ Finally, the name of the republic was changed from People's Republic of Benin to Republic of Benin and the Conference declared the birth of the "*Rénouveau Démocratique*". On 1st March four Acts were enacted implementing the decisions of the Conference and delineating the institutional organisation of the transitional period. These were the *Ordonnance* No. 90-001 repealing the 1977 Basic Law, the *Ordonnance* No. 90-004 establishing the *Haut Conseil de la République*, the Decree No. 90-043 appointing Soglo as Prime Minister, and finally, Decree No. 90-044 setting up the *Commission des lois et des affaires constitutionnelles*. The Constitutional Commission was composed of fifteen members, including thirteen lawyers (five judges, three lawyers, six university professors, four of whom were professors in law), and two diplomats. Five of them were former members of the *Commission des affaires constitutionnelles* at the Conference, seven were appointed as experts, one was delegated by the judiciary, one came from the *Association des Juristes africains* and the only woman was a representative of the *Association des Femmes Juristes du Bénin*. The Commission was presided over by Professor Maurice Glélé and was charged with producing a draft constitution by 11th April on the basis of the work of the Conference and to draw up the *Charte des partis* and an electoral act. The Commission suggested a presidential form of government with a single-house legislature. A multiparty system would be regulated by a *Charte d'union nationale*, une *Charte des partis* and a *Code électoral*. Moreover, apart from a *Haut Conseil de la République* and a *Conseil Economique et Social*, the Commission envisaged the creation of a Constitutional Court charged with the control of the constitutionality of laws, to which individual citizens would also have recourse to in order to submit a complaint. The Commission also expressly stated that the chapters of the new constitution on the rights and duties of citizens and on the judiciary "*prendront en compte les*

⁷¹³ See *Rapport Général de la Conférence* présenté par M. Albert Tévoédjre, rapporteur général. Published in *ibidem*, pp. 19-33.

préoccupations des délégués au sujet des libertés publiques et des droits de l'homme" and would draw inspiration from the UDHR and the African Charter on People's and Human Rights. Furthermore, the Commission provided for the establishment of appropriate organs to control the respect of human rights and punish all violations under the supervision of judicial authorities. It also maintained that the State had to compensate the victims of human rights violations.⁷¹⁴ Finally, the Commission, submitted a motion on human rights to the Conference, which was later approved.⁷¹⁵ This motion started by affirming that "*le respect de l'homme et de ses droits fondamentaux est une des conditions essentielles de la paix sociale et du développement*". On the basis of this premise, it invited the Ministry of Justice to establish the *Commission Béninoise des Droits de l'Homme* before 31th March 1990 and it decided to create a *Comité National de Lutte contre la torture et les sévices corporelles*, that would be responsible before the *Haute Conseil de la République*. The Committee was charged with identifying the state actors responsible for acts of torture or murder in the exercise of their functions as well as their superiors, inflicting disciplinary sanctions and determining the compensation to the victims in consultation with the Ministry of Finance and the other bodies concerned. The motion specified that disciplinary sanctions were not an alternative to judicial ones.

The interim period was regulated by the *Loi No. 90-008 portant organisation et attributions des circonscriptions administratives durant la période transitoire* and the *Loi Constitutionnelle No. 90-022 portant organisations des Pouvoirs de la période transitoire* approved by the HCR on 20th July 1990, by the *Loi No. 90-023 portant charte des partis politiques*. The Act 90-022 codified an already existing constitutional order delineated by the National Conference. This Act defined the Republic of Benin as an "*Etat de droit*", sovereign and independent, indivisible, secular, democratic and social. Article 3 recognised the pluralism of political parties, which "*concourent à l'expression du suffrage*". Title II entitled "*Des droits et des devoirs du citoyen*" protected the freedoms of movement, opinion, religion, expression, press, association, assembly and demonstration (Article 4), the inviolability of domicile and secrecy of correspondence (Article 8), equality of all before the law without any distinction on the basis of origin, race, sex and religion (Article 9). It severely prohibited any act of torture, inhumane and degrading treatment as well as arbitrary arrests and detention and established the principle of the presumption of innocence and defined the judiciary as the

⁷¹⁴ See *Les Actes de la Conférence Nationale* published by Fondation F. Naumann, ONEPI Edition, 1990, pp. 50-52.

⁷¹⁵ See in *ibidem*, pp. 38-40.

“*gardienne de la liberté individuelle*” (Article 7). However, the recognition of second-generation rights is more limited. Article 5 recognised the right to work and provided that the state strives to create the conditions to make its enjoyment effective. Article 6 acknowledged the right to strike and to organise under the conditions established by law. As far as duties are concerned, the Constitution provided the duty to pay taxes (Article 11), to respect and protect public goods (Article 12) and to respect the discipline of work, public order and the rules of life in society (Article 13).

The remaining titles regulated the institutions of the President of the Republic, the Prime Minister (Title III), the Government (Title IV) and the *Haut Conseil de la République* (Title V). The Prime Minister carried out the function of head of government, while the *Haut Conseil* exercised that of the legislature. The *Haut Conseil* was composed of the members of the Presidium of the Assembly of the National Conference, the former Presidents of State, the Presidents of the Commissions of the National Conference and representatives of the provinces. The principle of ‘*concertation*’ dominated the relationships between the three powers and this represented the major legacy of the Conference to the period of transition.⁷¹⁶ According to Article 29, the President of the Republic, the *Haut Conseil de la République* (HCR) and the government periodically held sessions of ‘*concertation*’ on national politics. The recommendations and the decisions of the HCR adopted on occasion of these sessions were executive.

The interim government appointed by Soglo on the HCR’s advice was composed of civil servants, academics and former politicians, respecting a geographical balance. There were three main points of the programme presented by Soglo in its speech of inauguration on 12th March. The first point related to human rights. Soglo indicated that the consolidation of democracy, which “*suppose le respect des Droits de l’Homme*” was a primary goal of its government. The second goal was a “reasonable” implementation of the Programme of Structural Adjustment.⁷¹⁷

There were several acts which confirmed the widespread concern regarding human rights. The first was the establishment of the *Commission Nationale des Droits de l’Homme* on 30th March 1990. On 2nd May the Minister of Justice met the associations of former political detainees and endorsed the creation of a national committee to combat torture. Gradually, former political detainees were given back their properties and jobs. In addition,

⁷¹⁶ See A.D. Adamon, *Le Renouveau démocratique au Bénin. La Conférence Nationale de Forces Vives et la période de Transition*, L’Harmattan, Paris, 1995, p. 144-145.

⁷¹⁷ Ministère de l’Information et des Communications, *Les grandes orientations du gouvernement de transition*, ONEPI, Cotonou, April 1990, pp. 12-25.

the Universal Declaration of Human Rights was being read in the schools and reforms of both the police and the army later took place.

Unlike in Zambia, the government of Benin adopted a participatory approach. Meetings, largely reported by the mass media, were held between the ministers and workers concerned to discuss and negotiate social issues. However, the financial situation continued to be critical and, therefore, any discussion of the terms of the SAP was avoided. Nevertheless, some improvements were introduced. Salaries started to be paid as a result of donors' aid, which also led to a strengthened relationship of dependence.

The constitution-making process also continued. A draft constitution was subjected to a consultation process of the population. Conferences were held in towns (in French) and in rural areas (in the different national languages) throughout the country. During these conferences the notions of constitutional law, democratic institutions and procedures were explained to the citizens. Moreover, people were allowed to express their opinion on the draft constitution. All of the amendments proposed by citizens were collected and submitted to the *Haut Conseil*, which, in turn, transmitted its recommendations to the Constitutional Commission. The latter drafted the constitution on the basis of these. On 9th August 1990 the *Haut Conseil* unanimously approved the Constitution, leaving the issue of the age limit of candidates to the Presidency of the Republic open.

The next step of the process of the consolidation of democracy involved the holding of elections. The first elections held were the elections of the *chefs de villages et quartiers de ville* on 10th November 1990 followed by those of the *maires de communes*. The participation rate was 62.37 per cent in the former and 61.13 per cent in the latter and almost all of those in charge under the previous regime were not re-elected.

On 2nd December, the referendum on the Constitution was held. The participation rate was high, amounting to 63.8 per cent. Citizens had three options, they could either accept or reject the constitution as a whole, or reject the age limit provided. In reality, the entire constitutional debate was monopolised by two issues, namely, the form of the government and the age limit of the presidential candidates. At the Conference, the Constitutional Commission proposed a presidential system, however, the majority of the Conference was in favour of a semi-presidential system, and voted in that direction.⁷¹⁸ Both within the Constitutional Commission and among the public, the issue was intensely debated and provoked the first

⁷¹⁸ J. Gaudusson du Bois, "Quel statut constitutionnel pour le chef d'État en Afrique", in J.-C. Colliard et Y. Jegouzo (dir.), *Le nouveau constitutionnalisme. Mélanges en l'honneur de Gérard Conac*, Economica Ed., Paris, 2001, p. 335.

post-Conference political division. The government represented by Soglo, and the head of the *Haut Conseil* expressed their support for the semi-presidential system, making the vote appear as a referendum on the government and the democratisation process. The issue of the age limit was even more controversial. The draft Constitution provided a minimum age of 40 years and a maximum of 70 years for the presidential candidates. This provision was confirmed during the popularisation campaign of the draft constitution. However, it was opposed by the former presidents Maga, Ahomadegbe and Zinsou, who would have been excluded from the presidential race, if this provision had been approved. At the referendum, 73,3 per cent voted for the inclusion of the age limit. 19.9 per cent voted for the constitution without the age limit. Therefore, overall 96.9 per cent voted to accept the draft constitution.

After the referendum, legislative elections were held in February 1991 under a proportional electoral system. Fourteen parties and groups participated in the elections. The regionalist logic that dominated the country's politics in the 1960s re-appeared. In fact, only a small number of parties received votes in more than one region. With the presidential elections, which were held in March, the situation became tense. As in the 1960s, violence marked the electoral campaign. In particular, in the North, people who were originally from the South became victims of aggression and fled to the South. It was indicated that Kérékou was behind these acts of intimidation.

At the presidential elections, Soglo, Kérékou and Tévoédjre (a former ILO Deputy Director General) were the most eminent figures among the fourteen candidates and Soglo and Kérékou passed to the second round. The regionalist divisions that had already appeared in the legislative elections manifested themselves in an even clearer manner. Soglo, who is from the South, received 80 percent of his votes from the regions of the Southeast and the Centre and he received hardly any votes from the North. Kérékou, who is from the North, obtained 80 percent of his votes from the North. More surprising than the re-emergence of regionalism, was the passing of Kérékou to the second round of these elections. This was due to a combination of several factors. In the first place, the new political forces were divided between many parties and conducted political campaigns against each other, rather than against Kérékou, who was not believed to be a dangerous adversary. In the second place, the areas outside the capital had been excluded from politics. The lack of infrastructure, the difficulty in receiving broadcasts on the radio or television prevented these areas from receiving any information on the abuses of the regimes, the protests and the transitional process. Moreover, a section of the population, directly or indirectly, had taken part in the patrimonialistic management of the state of Kérékou and did not want to lose the privileges

the had enjoyed until then. In particular, the proposals relating to a verification of goods was a concrete threat to their position. Soglo, despite being ill during the second round of the elections, obtained 67.6 per cent of votes against the 32.4 per cent of Kérékou. On 31st March 1991, Kérékou conceded his defeat.

The post-Conference period was characterised by signs of different and contrasting nature. On the one hand, the Conference promoted a sense of freedom, which manifested itself in the proliferation of political parties and various organisations, including women's and human rights groups and organisations of victims of Kérékou's regime. Moreover, several private newspapers were founded and added their voice to the existing ones. In October 1990, forty-one newspapers were published and they turned out to be extremely critical and even forthright in their denunciation of illegal activities and past human rights abuses. The people kept up their interest in public life, and despite the high price of newspapers, citizens were eager to read them. Moreover, in spite of the succession of elections organised since the Conference, popular participation remained high. On the other hand, the 1960s style political behaviour re-appeared, particularly in the form of regionalism and clientelism. There were only three parties, the liberal democrats, the social democrats and the radicals that sought a nation-wide support, obtaining nine seats altogether out of a total of sixty four. Candidates were voted for on the basis of their regional origin and the vagueness and similarity of political programmes clearly did not provide the citizens with political criteria upon which to base their vote. Moreover, money and goods were promised to individuals and entire communities in order to convince them to vote for or join the political parties.

Civil society, which was the main actor of the renewed political process, did not play an important role in the post-Conference period. Students, teachers and the other public sector workers who set this change in motion, were not involved in a significant way in the creation of the new parties or in the election processes.

The post-Conference period was also characterised by the measures of structural adjustment, which included the closure and privatisation of several parastatal structures, dismissals of public servants and the distribution of limited resources to welfare and education (even for West African standards). Donors and the IMF provided the government with relatively little aid, which meant that the government was unable to continue to pay the salary arrears after some initial payments were made upon the receipt of some grants and loans. This situation led to a new wave of strikes of students, teachers and other public servants, despite the government's willingness to meet with them to discuss the crisis. Strikes were already held during the presidential elections and subsequently, in July, September and April.

10.1.4 The New Constitution

The new constitution delineates a presidential form of government with several aspects shaped on the French model. In order to guarantee stability whilst simultaneously avoiding the risks of presidentialism, this arrangement is tempered by the elements of parliamentarism. The President of the republic is elected for five years and can only be re-elected once. The Constitution specifies that no one can stand for more than two presidential mandates (Article 42). The President of the Republic is the head of government and, after "*avis consultatif*" with the National Assembly, he can appoint the members of the government, who are responsible to him (Article 54). He also appoints three of the seven judges of the Constitutional Court as well as the Presidents of the Supreme Court, of the High Authority of the Audio-Visuals and Communications, after consultation of the President of the National Assembly, (Article 56). He holds regulatory power, legislative initiative (Article 57) as well as the power of constitutional revision, after a decision taken in the Council of Ministers, concurrently with the members of the National Assembly (Article 154). Moreover, after consultation of the Presidents of the National Assembly and the Constitutional Court, the President can take the initiative to hold a referendum on any issue relating to the promotion and reinforcement of human rights, sub-regional and regional integration and the organization of public powers (Article 58). The President also holds veto on legislation. Moreover, the President can request the National Assembly to deliberate a second time on a particular Act or specific articles. If the text is approved by an absolute majority of the members of the Assembly and the President refuses to promulgate the law, the President of the National Assembly appeals to the Constitutional Court, which declares the Act effective if it is in conformity with the Constitution (Article 57).

The President has also the power of pardon, along with being head of the armed forces and has the same exceptional powers as the French President according to Article 16 of the 1958 French Constitution. According to Article 68, the President of the Republic can take exceptional measures in the Council of Ministers that are required in a situation where the republican institutions, the independence of the nation, the integrity of the national territory or the execution of the international engagements are threatened in a serious and immediate manner and the regular functioning of the public and constitutional powers are threatened or interrupted. These measures can only be taken after consultation with the Presidents of the National Assembly and the Constitutional Court. While the conditions are identical to those in the French Constitution, the Constitution of Benin establishes a barrier to the otherwise unlimited powers of the President by specifying that these measures shall be

adopted without suspending the rights of citizens guaranteed by the Constitution. Furthermore, the Assembly shall meet in extraordinary session and establish a time limit beyond which the President cannot take exceptional measures.

The President has also the power to address messages on the state of the nation, not only in the case provided in Article 68, but also on annual basis (Article 72,1). Similar to the French constitutional system, the President can also address messages to the Assembly, which shall not be followed by any debate (Article 72(2))

The President as well as the members of government are suspended from their functions in cases of impeachment for "*haute trahison*", "*outrage à l'Assemblée nationale*" and "*toute atteinte à l'honneur et à la probité*". If found guilty, "*ils ont déchu de leurs charges*" (Article 138). The impeachment before the *Haut Cour* is decided by the National Assembly and has to be approved by the majority of two-thirds of the members of the Assembly. L'*Haute Cour* is composed of the members of the Constitutional Court, apart from its President, six members of the National Assembly who are elected by the Assembly itself and the President of the Supreme Court.

The National Assembly is elected every four years. It exercises the legislative power and keeps a control on the action of the government (Article 79(2)). With regard to the former function, the Constitution establishes the matters which are reserved to the law. These include civil rights and the fundamental guarantees accorded to citizens for the exercise of public liberties (Article 98). The others are left to the regulatory power of the President. The Constitution also envisages the adoption of *ordonnances* by the government in matters reserved to the law with legislative authorisation of the Assembly (Article 102). The most important way in which the Assembly can control government action relates to its power to vote on the finance bill (Article 109) and the budget (Article 110).

The Constitution also contains original elements which reflect the past history of Benin and which aim to avoid the repetition of the events which have undermined democracy and human rights. The first concern addressed by the Constitution is represented by the risk of coups d'état. In this regard, the Constitution embodies a series of provisions explicitly addressing the prevention of future coup d'états. Firstly, "*toute tentative de renversement du régime constitutionnel*" by members of the armed forces or the public security is considered as a crime against the nation and the State (Article 65). Secondly, each member of a constitutional organ has the right and duty "*de faire appel à tous les moyens pour rétablir la légitimité constitutionnelle*" (Article 66(1)). Disobeying and organising against an illegitimate authority is defined as "the most sacred of rights and the most imperative of duties" for

citizens (Article 66(2)). Moreover, Article 67 authorises the President “à faire appel” to the armed forces or foreign police and request their intervention.

Another concern addressed by the Constitution is represented by the risk of personal and authoritarian rule. In order to prevent this risk, the function of the President is declared incompatible with any elective mandate, public employment, military and any professional activity (Article 51). This is confirmed by Article 64, which stipulates that any member of the armed forces or public security who desires to be a candidate to the presidency of the Republic must resign. As in the case of the President, the Constitution establishes an incompatibility between the candidacy for membership of the Assembly and membership of the armed forces or public security (Article 81(3)). Also the provision of the case of ‘*outrage à l’assemblée*’ as a ground for presidential impeachment can be read as a limitation against the risk of authoritarian rule. This arises when the President of the Republic does not provide any answers to the questions posed by the Assembly on the activity of the government within thirty days (Article 76). In this case, the President of the Assembly appeals to the Constitutional Court, which rules within thirty days, and the President of the Republic is required to provide responses to the Assembly before the end of the session. If this does not occur, the President of the Republic is referred to the High Court of Justice (Article 77).

The other main concern underlying the Constitution of 1990 is the phenomenon of corruption. The Constitution envisages that the President is personally responsible for the manifestation of a personal behaviour contrary to morals, as well as embezzlement, corruption and illicit enrichment (Article 75).

As far as the judiciary is concerned, its power shall be independent from the legislative and executive (Article 125). However, as in the 1977 Constitution, the guarantee of the independence of the judiciary is vested with the President of the Republic, who is assisted by the *Conseil supérieur de la magistrature* (Article 127). The composition, competencies, organisation and functioning of the *Conseil* are determined by law. The judiciary is appointed by the President of the Republic on the Minister of Justice’s recommendation, upon the advice of the *Conseil supérieur de la magistrature* (Article 129).

A fundamental organ for the protection of fundamental rights and freedoms is the *Cour Constitutionnelle*. The Constitutional Court is the “highest jurisdiction of the State in constitutional matters” and judges of the constitutionality of the law and “shall guarantee the fundamental human rights and the public liberties” (Article 114). It is composed of seven members, three of whom are appointed by the *bureau* of the National Assembly and three by

the President of the Republic for five years. Their mandate can only be renewed once (Article 115).

In addition, the Constitution provides for two more organs, namely the *Conseil économique et social* (Title VII) and the *Haute Autorité de l'audiovisuel et de la communication* (Title VIII). The former is a consultative body, which must be consulted on the "*projets de loi de programme à caractère économique et social*" and any other bill which is submitted to it by the government. It can also be consulted by the President of the Republic on any problem of economic, social, cultural, scientific and technical nature and, on its own initiative, can formulate recommendations on economic and social reform (Article 139). As it will be shown in the following section, the *Haute Autorité de l'audiovisuel et de la communication* plays a role in guaranteeing of the freedom of press.

10.1.5 Human Rights in the New Constitution

The detailed way in which human rights are protected in the new constitution of Benin has been noted by Conac, who also points out that this even indicates the specific practices which are prohibited, thus indicating that "[v]isiblement c'est l'expérience plus que le mimétisme qui a inspiré cette précaution."⁷¹⁹ In fact, the constitutional provisions concerning human rights clearly reflect the history of Benin and attempt to create a human rights culture and institutional mechanisms, often having original traits, in order to prevent the abuses of the past from occurring again. Unlike the 1960 Constitution, the transplant of the model of liberal constitutionalism has not been effected in a mechanic manner in the one of 1990. This model has been adopted in order to pursue a specific aim of the constitution makers, i.e. the limitation of political power. This aim has emerged from the experience of oppression and repression suffered by the Beninese people. Glélé, the chairman of the Constitutional Commission, has written: "*La population exprime plusieurs idées, parfois contradictoires, qu'il faut mettre ensemble; mais une chose est certaine, on sent un besoin profond de liberté dans la population, une volonté de participer désormais à la gestion de la chose publique, de limiter l'omnipotence des pouvoirs publics et le souhait d'un développement pour tous avec une moralisation de la vie politique, car il y a eu trop de corruption, d'arbitraire et d'autres abus*".⁷²⁰

Moreover, the Constitution features elements of originality in respect to Western liberal constitutionalism. For example, original features include the absence of a quorum for

⁷¹⁹ Conac, *L'Afrique en transition*, cit., p. 37.

⁷²⁰ Glélé, Bénin, in *ibidem*, p. 174.

the recourse by the legislature to the Constitutional Court and the right of the Court to rule *ex officio* on the constitutionality of laws and regulations allegedly violating fundamental rights and freedoms.⁷²¹ In addition, the reference and even incorporation of the African Charter provides the Beninese Constitution with a distinct African perspective, characterised by the attempt to reconcile the individualistic and the communitarian perspectives on human rights. In this respect, the Beninese Constitution has the value of being less ambiguous than the African Charter on how to solve the often problematic relationship between the two.

The preamble of the Constitution “reaffirms” the attachment of the people of Benin to the principles of democracy and human rights as they have been defined by the Charter of the United Nations and the Universal Declaration of Human Rights, as well as the African Charter on Human and Peoples’ Rights. The African Charter is even considered to be an “integral part” of the Constitution and has a “value superior of the internal law” (Article 7 of the Constitution). This is confirmed by Article 147, which establishes that all treaties and agreements ratified by Benin shall have an authority superior to that of laws.

Title II is entitled “*Des droits et des devoirs de la personne humaine*”. The first rights to be recognised are socio-economic and cultural rights. Article 8 protects the rights to health, education, culture, information, vocational training, and work. Article 9 recognises the right of every human being to the “development and full expansion of his person in his material, personal and intellectual dimensions”. Articles 10 and 11 protect the right to culture in its individual and collective dimensions. Article 10 acknowledges the right to culture of every person, while article 11 protects the right of “all communities comprising the Beninese nation ... to enjoy the freedom to use their spoken and written languages and to develop their own culture while respecting those of others”. The Constitution provides that “*collectivités territoriales*” are created by law (Article 150).

Articles 12 and 13 relate to the right to education. Article 13 establishes that primary education shall be obligatory and the State shall assure progressively free public education. Article 30 recognises the right to work, for the effective enjoyment of which the State shall strive to create the conditions, and to just retribution. The right to strike and to defend workers’ rights and interests individually or collectively or by trade union action is provided in Article 31.

Articles 15 to 26 cover civil and political rights. Political rights are also implicitly

⁷²¹ See R. Degni-Segui, *Les droits de l’homme en Afrique Noire francophone (Théories et réalités)*, Abidjan, 1998 and A. Diarra, “La protection constitutionnelle des droits et libertés en Afrique Noire francophone depuis 1990. Les cas du Mali et du Bénin”, in *Afrilex*, 2000, at www.afrilex.u-bordeaux.fr, p. 22.

recognised in Articles 2 and 3, which confirm adherence to democratic principles. Moreover, Article 5 expressly mentions political parties, which "*concourent à l'expression du suffrage*" and are formed and freely exert their activities under the conditions determined by the Charter of Political Parties. The right to life, liberty, security and the integrity of the person are guaranteed by Article 15. The Constitution further provides that no one shall be arrested or accused except by virtue of a law promulgated prior to the charges against him and no citizen shall be forced into exile (Article 16). This latter provision is clearly envisaged as a way to address one of the injustices of the past. The presumption of innocence and the prohibition of convictions for acts or omissions and penalties not provided by law at the time when the offence was committed are established (Article 17). The Constitution also prohibits torture, maltreatment, cruel, inhumane or degrading treatment and declares that no one may be detained in a penal institution unless this is in compliance with a penal law which is in force. The Constitution also establishes that no one may be detained for more than forty-eight hours except by decision of a magistrate. This delay may be prolonged only in circumstances exceptionally provided for by law and may not exceed eight days (Article 18). In light of the abuses of the past, the Constitution provides that any individual or agent of the State found responsible for an act of torture, maltreatment or cruel, inhumane or degrading treatment in the exercise or at the time of the exercise of his duties shall be punished in accordance with the law. This provision applies both in the case that the act has been committed on his own initiative or under instruction. The Constitution goes even further stating that any individual or agent of the state is not required to comply with the duty of obedience when the orders received constitute a "serious and manifest infringement with respect to human rights and public liberties" (Article 19).

The remaining provisions guarantee the inviolability of domicile (Article 20), the secrecy of correspondence and communication (Article 21), the right to property including a "just and prerequisite compensation" in the case of the deprivation of property for "state-approved uses" (Article 22), freedom of thought, conscience, religion, creed, opinion, expression in respect for the public order established by law and regulations (Article 23), freedom of the press (Article 24), freedoms of movement, association, assembly, procession and demonstration (Article 25), equality before the law without distinction of origin, race, sex, religion, political opinion or social position (Article 26). The principle of gender equality is confirmed in paragraph 2 of Article 26, which specifies that men and women are equal under the law. It then adds that "the State shall protect the family and particularly the mother and the child". The Constitution provides for the principle of equality and the protection of the family

in the same article (Article 26(2)), however, unlike the 1977 Constitution, the protection of the family is not presented as a value against which the principle of equality should be interpreted. However, according to the African Charter, which is integral part of the Constitution, the State “shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the Community” (Article 18(1)) and at the same time, “ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions” (Article 18(2)). While the combination of these two provisions seems to give prevalence to the right of women not to be discriminated against over the values embodied by the family, a different interpretation may ensue from Article 27⁷²² and from Article 29, which imposes on every individual the duty “[t]o preserve the harmonious development of the family and to work for the cohesion and respect of the family” (paragraph 1) and also “[t]o preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-being of society” (paragraph 7). As already noted, the attempt made by the Charter to accommodate traditional values with individual rights, through the imposition of specific duties, fails to resolve the question of their relationship. The balance between African values, particularly those linked to family, and the principle of equality between men and women is therefore left to the interpretation of the legislature and the judiciary. A first indication on its interpretation comes from Article 98 of the Beninese Constitution, which provides that the procedure through which customs are assessed and harmonised with the fundamental principles of the Constitution shall be reserved to the competence of the law. Implicitly, the Constitution states that customs, which also regulate family relationships, should be made consistent with the principle of gender equality. Following the example of the African Charter, the Constitution devotes a specific provision to people with disabilities and the elderly. It provides that they “shall have the right to special measures of protection in keeping with their physical or moral needs” (Article 18(4)).

The Constitution also embodies third generation rights. It recognises the right to a “healthy, satisfying and lasting environment”, which is accompanied by the duty of every person to defend it (Article 27). The wording of this article recalls that of Article 24 of the African Charter, with the distinction that in the Beninese Constitution, it is envisaged as an

⁷²² Art. 27 states: “1. Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community. 2. The rights and freedoms of every individual shall be exercised with due regard to the rights of others, collective security, morality and common interest”.

individual right, while in the African Charter it is presented as a collective right. Articles 28 and 29 regulate the problem of toxic waste imported in Africa and provides that the transportation, importation, storage, burying and the discharging on the national territory of toxic wastes or foreign pollutants and any agreement relating to it shall constitute a crime against the nation (Article 29).

In conformity with the African Charter, the Constitution also establishes a range of duties for the citizens. These include the duty to work for the common good, to fulfil all civic and professional obligations, to pay fiscal contributions (Article 32), to respect the Constitution, the established constitutional order and the laws and regulations (Article 34) and to respect and consider one's own kin without any discrimination (Article 37).

The effective protection of human rights requires adequate enforcement mechanisms. In this regards, the Beninese constitution has accorded a central role to the Constitutional Court. The Constitution recognises the citizen's right to appeal to the Constitutional Court against allegedly unconstitutional laws, texts and acts (Article 3). The individual right to appeal had also been provided in the 1968 Constitution, but it had never been applied because the Constitution as a whole was never implemented. According to the present constitution, appeals can be made directly to the Constitutional Court or by procedure of exception of unconstitutionality in relation to any matter which concerns the appellant before a court of law (Article 122). The Constitutional Court can also be requested by the President of the Republic or any member of the National Assembly to give its opinion on the constitutionality of laws before their promulgation. This opinion shall be given *ex officio* on laws and any regulatory text deemed to infringe on fundamental human rights and public liberties (Article 121). Furthermore, both organic laws and the Rules of Procedure of the National Assembly, the High Authority of Audio-Visuals and Communications and the Economic and Social Council, before their promulgation and enforcement respectively, must be submitted to the Constitutional Court, which shall decide on their conformity with the Constitution (Article 123). The Constitutional Court must rule within a period of fifteen days from when it has been informed of a text of a bill or a complaint. If there is an emergency, the period can be reduced to eight days upon government's request (Article 120). Any provision declared unconstitutional cannot be promulgated or enforced (Article 124). A further competence of the Constitutional Court which has a bearing on the respect of the constitutional provisions on human rights is envisaged in Article 146. This provision establishes that if the Constitutional Court declares, upon recourse of the President of the Republic or of the President of the National Assembly, that an international instrument includes a clause which is contrary to the

Constitution, its ratification can only be authorised after the revision of the Constitution.

The Constitution also envisages other enforcement mechanisms. With regard to the freedom of the press, the Constitution provides for the creation of the *Haute Autorité de l'audiovisuel et de la communication* (High Authority of Audio-Visuals and Communications). Article 142 establishes that its mission consists of guaranteeing and ensuring the freedom of the press, as well as all the media in conformity with the law. More specifically, it monitors the respect of the professional code of conduct and the equitable access of political parties, associations and citizens to the official means of information and communication. This Authority was set up by *loi organique* n. 92-021 of 21st August 1992, which defined it as “*une institution indépendante de tout pouvoir politique, association ou groupe de pression de quelque nature que ce soit*”. According to the law, the Authority is charged with ensuring the respect of “*l'expression pluraliste des courants de pensée et d'opinion dans la presse et la communication audiovisuelle, notamment pour les émissions d'information politique*”. Furthermore, it is endowed with the power to address observations and impose sanctions on the relevant body in the case of “*manquement grave aux obligations*” (Article 13). Its decisions, with the exception of disciplinary decisions, can be appealed before the *Chambre administrative* of the Supreme Court.

The authority is composed of nine persons, three of whom are designated by the *bureau* of the National Assembly, three by the President of the Republic, three by professional journalists and technicians of the audiovisual, communication and telecommunications. Its mandate lasts five years and cannot be either renewed or revoked. Contrary to the aim of reinforcing the autonomy of this authority, the President is appointed by decree adopted in the Council of Ministers, after consultation with the President of the National Assembly (*loi organique* of 1992 and Article 143 of the Constitution).

A final protection for human rights relates to the modalities for the revision of the Constitution. The right of initiative is held by the President of the Republic, on the basis of a decision taken in the Council of Ministers, as well as by the members of the National Assembly (Article 154). The draft or proposal of revision must receive the vote of a three-quarters majority of the members of the National Assembly and unless it is approved by four-fifths majority of the members, it must be then approved by referendum (Article 155). Apart from prohibiting that the integrity of the State can be undermined through revision, the Constitution stipulates that the republican form and the secularity of the State cannot be subject to revision (Article 156).

Further provisions relevant to human rights are contained in Title III on the executive

power. Article 58 provides that the President of the Republic, after consultation with the President of the National Assembly and the President of the Constitutional Court, shall be able to take the initiative of the referendum on any question relating to the promotion and reinforcement of human rights. In addition, Article 66 states that in the case of a coup d'état, putsch, aggression by mercenaries or any action of force, "the most sacred of rights and the most imperatives of duties" is for any Beninese to disobey and organise themselves "*pour faire échec à*" the illegitimate authority.⁷²³ Finally, apart from the cases referred to above, the President is personally responsible in the case of high treason, which occurs when the President violates his oath or is recognised as agent, co-agent or accomplice of "*violations graves et caractérisées de droits de l'homme*".⁷²⁴

The drafters of the Constitution were aware that it is not sufficient to guarantee rights and freedoms in the constitution, without creating a human rights culture. Glélé has referred to the necessity of "*une éducation civique, une pédagogie de la démocratie pluraliste fondée sur l'État de droit, d'un droit qui garantisse la liberté et le respect des Droits de l'homme*".⁷²⁵ Consistent with this approach, the Constitution obliges the State to ensure the circulation and the teaching of the Constitution, the UDHR, the African Charter as well as all of the other international instruments on human rights ratified by Benin. Moreover, the State is called upon to integrate the rights of the individual into the programmes of schools and universities as well as into the educational programs of the Armed Forces, the Public Security Forces and comparable categories. In addition, the State must assure the diffusion and teaching of human rights in the national languages especially by radio and television.

Beyond the Constitution, Benin has shown a commitment to creating institutions, which ensure the effectiveness of the democratic principle and of the liberties provided by the Constitution. In 1995, the National Assembly adopted the *Loi portant règles générales pour les élections du président de la République et des membres de l'Assemblée nationale*, which has established a *Commission électorale nationale autonome* (CENA). This commission is set up on the occasion of each election and is composed of seventeen members, seven of whom are chosen by the government, seven by the National Assembly, two by the *Commission béninoise des droits de l'homme* and one by the *Assemblée générale des magistrats* (Article 36). The CENA is represented in each department by a *Commission électorale*

⁷²³ This provision recalls the natural right of resistance to oppression in the 1789 French Declaration.

⁷²⁴ Other cases of personal responsibility of the President include the concession of a part of the national territory or an "*acte attentatoire au maintien d'un environnement sain, satisfaisant, durable et favorable au développement*" (Article 74).

⁷²⁵ Glélé, Bénin, cit., p. 177.

départementale formed of nine persons, four of which are chosen by the government, four by the National Assembly and one by the *Assemblée générale des magistrats*. At the level of each constituency, a *Commission électorale locale* is appointed by the CENA on the proposal of the *Commission électorale départementale*.

The task of the CENA consists of preparing, organising, following and supervising the elections and the centralisation of results, which are then made available to the Ministry of Interior and then transmitted to the Constitutional Court. It has also investigative powers in order to ensure "*la sincérité du vote*" (Article 37(2)).

Independent authorities are present in other countries of francophone Africa, such as Mali and Senegal,⁷²⁶ with the common aim of reinforcing the protection of fundamental rights and freedoms in respect of administrative action.⁷²⁷ This is clearly spelled out by the Constitutional Court of Benin which, upon an appeal by the President of the Republic over the constitutionality of CENA, stated that its establishment "*se fonde sur les exigences de l'Etat de droit et de la démocratie pluraliste affirmées dans le préambule de la constitution du 11 décembre 1990*" (Decision DCC 34-94 of 22 and 23 December 1994). As far as the legal nature of these authorities is concerned, the Court clarified this in the above decision by defining CENA as "*une autorité administrative autonome et indépendante du pouvoir législatif et du pouvoir exécutif*". In reality, the independence of CENA from the executive is reduced not only by the presence of government appointees, but also by the fact that the Commission carries out its functions in collaboration with the Minister designated by the Government, on which it also depends for the means necessary to fulfil its mission.⁷²⁸

⁷²⁶ The Constitution of Mali of 1992 provided the *Comité National de l'Egal Accès aux Médias d'Etat* (Article 7), which was established by the Act No. 93-001 of 6th January 1993. Moreover, with the Act No. 97-008 of 14th January 1997 the *Commission Electorale Nationale Indépendante* (CENI) was set up. In Senegal the Act No. 97-15 of 8th September 1997 instituted the *Observatoire Nationale des Elections* (ONEL) and with the *Loi* n. 91-14 of 11th February 1991 created the *médiateur de la République*, an "independent authority" competent to receive complaints concerning the functioning of the administration of any organ "*investi d'une mission de service public*".

⁷²⁷ A. Diarra, "Les autorités administratives indépendantes dans les Etats francophones d'Afrique Noire. Cas du Mali, du Sénégal et du Bénin", in *Afrilex*, 2000, pp. 1-25.

⁷²⁸ In a following decision (DCC 96-002 of 4th and 5th January 1996) the Constitutional Court specified that the competence in case of electoral dispute lies with the Constitutional Court, confirming the administrative nature of CENA.

10.2 Human Rights in Practice

10.2.1 The Human Rights Situation in Benin

Benin's transition to liberal-democracy has had a promising start which has been successfully confirmed thus far, although this is one of the rare examples in sub-Saharan Africa. Benin has been the first country in sub-Saharan Africa to have a President, who left power without putting up any resistance after having lost in the democratically elections. Since then, elections have been held regularly and have been largely peaceful. Legislative elections were held in 1991, 1995, 1999 and March 2003. What is interesting to remark is how the political platforms of all of the parties included a commitment to the following principles: human rights, democracy, political pluralism, separation of powers and a system of checks and balance.⁷²⁹ By now, these principles have become indispensable components of any political program and are an integral part of the political rhetoric.

Presidential elections were held in 1991, 1996 and 2001 and, for the first time after the reintroduction of multipartism, municipal elections were held in December 2002.⁷³⁰ Parties, which are at the opposition in the national parliament, prevailed in these elections. Notably, *Renaissance du Bénin* (RB) and the *Parti du Renouveau Démocratique* (PRD) obtained positive results. Strong participation was witnessed at both parliamentary and presidential elections, despite the large number of political parties and the cumbersome voting procedures.⁷³¹ This shows the weakness of the argument that multiparty politics is not compatible with "African culture". Nevertheless, the positive image of Beninese democracy was tarnished by episodes of violence during the 2001 presidential elections, and the fairness of these elections was strongly questioned. Despite passing to the second round, Soglo withdrew his candidature and this was followed by Amoussou, who came third, thus facilitating Kérékou's election. He was elected with 84 per cent of the votes. Nine members of the Electoral Commission resigned in protest.

The definition of Benin as "one of Africa's few success stories"⁷³² is also linked to the fact that civil liberties, including the freedoms of the press and expression, are widely respected.⁷³³ In Benin more than 50 newspapers and periodicals are issued. Since 1997, the

⁷²⁹ For the programmes of the Beninese political parties see Konrad Adenauer Stiftung, *Les programmes des partis politiques au Bénin*, Docum. 7, Colloque National, 10th March 1994, Cotonou, Benin, p. 75.

⁷³⁰ Previously mayors and municipal councillors were designated by the government.

⁷³¹ Given the large criteria established by the Charter of Political Parties, almost a hundred political parties are recorded at the Ministry of Domestic Affairs.

⁷³² B. Magnusson, "Benin: Legitimizing Democracy. New Institutions and the Historical Problem of Economic Crisis", in CEAN, *L'Afrique politique: Démocratisation: Arrêts sur images*, Karthala, Paris, 1996, p. 33.

⁷³³ The only legal threat to the free exercise of the press that still exist is Act No. 60-12 of 30th June 1962 on the freedom of the press, which envisages the imprisonment, involving also compulsory labour, for various acts or

private press has received financial aid from the State. Moreover, the audio-visual scene underwent a process of liberalisation as the High Authority of the Audio-Visuals and Communication has given authorisation for private radios and televisions.⁷³⁴ More importantly, this quantitative pluralism is strengthened by the fact that radio and TV, including the state-owned ones, openly criticise the government without being subjected to any interference.

Civil society also has other means of expression such as the churches and NGOs, which also shows that freedom of assembly and association are both respected. In Benin, approximately a hundred non-governmental organisations operate and they have demonstrated that they play a significant role in the defence of human rights. For instance, the investigative function exercised by the Benin League for the Defence of Human Rights was fundamental with respect to the allegations that hundreds of people were extra-judicially executed in Togo after the controversial 1998 presidential elections. Among all of the civil society organisations, women's groups are doing impressive work in furthering women's human rights in Benin as in several other African countries. One of the most significant results of their action achieved so far, together with the election of female MPs, has been the approval of the new Family Code in 2002.

The most symbolic feature of the "new" Benin is the role of the rule of the law. This is significant in a country like Benin, where violence has been used for long as the mechanism through which conflicts were solved. The positive evaluation of Benin's transition to democracy is also linked to the willingness demonstrated by the Beninese government to deal with past and present human rights abuses. Under the impulse of the National Conference, trials were initiated against the persons responsible of the most serious violations during the era of the military regime. The Amnesty International's 2000 report observed that "[t]he trend towards greater respect for human rights continued" despite cases of excessive use of force by the security forces, detention without charge and prosecution of asylum seekers. These events were counterbalanced by the fact that they were not left unaddressed. The President set up a commission of enquiry into the former cases and released the asylum seekers. On this latter case, the outcry of Amnesty International and other human

activities realised in the exercise of freedom of expression. This Act has not been repealed by Act No. 97-010. The ILO Committee of Experts on the Application of Conventions and Recommendations has expressed its concern at this provision, which is in conflict with the ILO Abolition of Forced Labour Convention, 1957 (No. 105), which has been ratified by Benin. Moreover, it is not in compliance with Articles 8, 18 and 30 of the Beninese Constitution and, even more specifically, with Article 3 of the Labour Code which prohibits forced labour "de façon absolue".

⁷³⁴ Audiovisual communications were liberalised by law through Act No. 97-010 of 20th August 1997.

rights organizations was a key factor in provoking the reaction of the Government. This also shows the weight that external criticism of the human rights performance plays in contemporary African politics and in turn, the political force of human rights. African governments, certainly to various degrees, believe that they cannot afford to be criticised for their human rights records, due to the cost in terms of financial aid from Western countries.

Despite the positive image concerning the rule of law and the implementation of civil and political rights, problems still exist as far as their enforcement is concerned. Arbitrary arrests, detention in custody for the periods longer than the maximum provided by law and brutal and inhuman detention conditions still occur. The major problem is the fact that the police still lacks a human rights culture and the judiciary is not well equipped to effectively enforce the law. In addition, the number of judges is very low with only approximately 150 judges in a country with a population of around six million people. Furthermore, low salaries make judges prone to corruption. There are other factors which hinder the population (especially in rural areas) from making recourse to the state judicial system. For example, the Court of Appeal is based in the capital and the French is used throughout the procedure, which 90 percent of the population can neither read nor speak. Furthermore, cultural obstacles still exist for people to appeal to the state court, which relate to the adversary nature of the model of justice applied. Therefore it is still frequent the recourse to traditional arrangements.

Another issue which detracts from the positive human rights record of Benin relates to the realisation of women and children's rights as well as social and economic rights of both men and women as provided by the Constitution, the African Charter of Human and People's Rights and the human rights instruments ratified by Benin. The evaluation of the human rights performance of many countries, especially those in transition from autocratic regimes is often focussed exclusively upon progress made with regard to civil and political rights. In this way, the traditional work of international human rights NGOs has tended to focus on first generation rights. Donors' policies have an even narrower scope of concern, often being satisfied with the implementation of the procedural aspect of democracy.

Unfortunately Benin is no exception in sub-Saharan Africa on the status of women and girls and the fulfilment of socio-economic rights. It should be noted that since 1990, important measures have been taken to ensure legal equality. Apart from the Constitution, the new Labour Code adopted with Act No. 98-004 of 27th January 1998 guarantees equality at work. This introduces the principles included in the ILO Discrimination (Employment and Occupation), Convention 1958 (No. 111) and the ILO Equal Remuneration Convention, 1951

(N. 100) into the Beninese legal system. This is an important first step to addressing the situation of widespread discrimination against women in both the private and public sectors in relation to access to employment and treatment at work. However, in reality, women still do not enjoy equal enjoyment of social and economic rights, notably in the spheres of education and work. In 1995, primary education rates among women stood at 44 per cent, while that of boys was at 88 percent.⁷³⁵ This also affects their ability to exercise civil and political rights and participate in the political life of the country. The discrimination faced by women has long established roots. The first of these is common to all forms of human rights' violations and is linked to a lack of knowledge of the law by the population, 80 percent of which is illiterate. Secondly, it is difficult to overcome the deeply embedded cultural norms and practices, which do not recognise the equality of men and women. Furthermore stereotypes, which we find also in the West, relegate women to certain positions at work and to occupational levels which do not involve any authority. Moreover, according to Beninese customs, women have a sacred role to perform which consists of taking care of their husband in order to allow them to fulfil their role of liaison with the ancestors. This tradition acts as a compelling obstacle to women's equal opportunities in respect to social and economic rights.⁷³⁶ Other customs impinge on women's equal opportunity both in education and at work. This includes the phenomenon of early and forced marriages. Under the 1931 Dahomey Code of Customary Code, women can marry at the age of 14. Moreover, as women are considered as minors under the guardianship of men (either the father, the husband or the brother) under customary law, they do not have access to credit and land, including through inheritance. This, in turn, constitutes another compelling barrier for women to take part in gainful economic activities.

However, the perceived difficulty in overcoming challenges posed by traditional beliefs should not be used as a justification for inaction in the area of human rights. For example, in 1993 when the government abolished school fees for girls to encourage education in rural areas, this resulted in the increase of enrolment rates which was higher for girls than for boys.⁷³⁷

In 2002 a meaningful step was taken towards the realisation of women's rights. Due to pressure from women's groups and the commitment of women MPs, a "*Code des*

⁷³⁵ United Nations Population Fund, *The State of World Population*, 1997.

⁷³⁶ B.C. Amoussou, *Etude nationale pour l'identification des obstacles à la mise en œuvre effective des principes et droits fondamentaux au travail au Bénin*, WP. 3, ILO, Geneva, August 2001, Ch. 4.

⁷³⁷ The Centre for Reproductive Law and Policy and the Association des Femmes Juristes du Bénin, *Reproductive Rights of Young Girls and Adolescents in Benin*, 1999, p. 9 available at <http://www.crlp.org>

personnes et de la famille" was adopted. This code had been blocked in Parliament since 1995, because the male deputies put up strong resistance to its adoption. These resistances were evident even on the occasion of the approval of the Code in 2002. It was approved with 44 votes in favour, one against and no abstentions, however at the time of the vote, almost half of the deputies were absent. The important changes introduced with the new Personal and Family Code include the prohibition of forced marriage and the practice of *lévirat*, which consists of the marriage between a widow and the brother of the deceased spouse. In addition, the Code establishes that women can only marry at the age of 16 and men at the age of 18. Moreover, it recognises the right of women to keep their family name as well as that of her husband in all official documents. However, other provisions, which were included in the Draft Code, were not approved, provoking strong condemnation from women MPs. The bill established that monogamy was "*le principe*" and polygamy "*l'exception*". Under the Code as approved in 2002, the two forms of marriage are equally recognised. The president of the opposition party, *Renaissance du Bénin*, Rosine Soglo, announced that she would bring a case to the Constitutional Court against this provision. Another provision included in the Draft Code, which was not approved, stipulated that only civil marriages produce legal effects and that religious marriages could be celebrated only upon the presentation of a certificate of civil marriage. This provision was envisaged as a means to prevent early and forced marriages.⁷³⁸

Female genital mutilation constitutes another traditional practice which undermines the right of women to equality and to health, as well as children right not to be exposed to sexual and physical violence as provided by Articles 19 and 34 of the Convention on the Right of the Child.⁷³⁹ According to WHO data, it affects a half of the female population. However, these are declining trends. The Ministry of Health, Social Welfare, and the Status of Women presented a draft law to the Parliament in April 1998 expressly prohibiting it. Theoretically, its prohibition could be already derived from the Constitution as Article 15 provides that "[e]very individual has the right to life, liberty, security, and the integrity of his person ... no one shall be subject to torture, nor to cruel, inhuman or degrading treatment", as well as from Article 4 of the African Charter on Human and People's Rights, which establishes that "human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right".

⁷³⁸ Idrissou-Touré, *BENIN: Les députés votent le Code de la famille malgré certaines dispositions controversées* at <http://www.famafrique.org/nouv2002-00140.html>

⁷³⁹ Ratified in Benin in 1990.

Moreover, the Penal Code punishes voluntary injuries and wounds,⁷⁴⁰ and heavier punishment is sanctioned when acts of violence are committed against female children under the age of 15 and those who commit the act are the parents of the child.⁷⁴¹

Other progress has been made on the issue of gender equality, even though they concern a limited élite. Since its establishment, the Constitutional Court has been presided over by a woman⁷⁴² and, in 2001, for the first time in the history of Benin, a woman, Marie-Elise Akouavi Gbèdo, was a presidential candidate. Moreover, the government has undertaken various initiatives to promote equality between men and women. A ministry dealing with Health, Social Welfare and the Status of Women has also been created. Moreover, measures have been taken to increase the level of girls' education, including the establishment of the National Network for the Promotion of Girls' Education by the Ministry of Education with the support of the Ministry of Social Welfare and the Status of Women. The Ministry of Education has also awarded scholarships to students receiving Certificates of Primary Studies, with preference to female students. Advertisements have been broadcast on television and radio, and educational kits have been developed to promote girls' education. These activities form part of Benin's initiative for the promotion of the decade of the child as a follow-up to the 1990 World Summit on Children, which set specific targets concerning girls.

However, the situation of children in Benin remains worrying. Apart from the practice of genital mutilation, child labour and trafficking are widespread phenomena. *De iure* child labour is banned in Benin through the ratification of the ICESCR,⁷⁴³ the Convention on the Rights of the Child,⁷⁴⁴ the African Charter,⁷⁴⁵ and above all the ILO Conventions No. 138 and 182. Moreover, the Labour Code establishes a minimum age of 14 years and prohibits night work for people under the age of 18. In addition, a decree was adopted in November 2000, which bans children from certain difficult and hazardous jobs. In the public sector, the *Statut des agents permanents de l'Etat*⁷⁴⁶ provides that the minimum age for employment is 18. However, in Benin, there are almost 500,000 child labourers.⁷⁴⁷ There are many explanations for this phenomenon, including economic, as well as cultural and religious reasons. Poverty is

⁷⁴⁰ Penal Code, Article 309, para. 3 and 4.

⁷⁴¹ Ibidem, Article 312, para. 6, 8 and 9.

⁷⁴² This was firstly carried out by Ms. Elisabeth Pognon and then by Ms. Conceptia Ouinsou.

⁷⁴³ Article 10, 3.

⁷⁴⁴ Article 32, 1.

⁷⁴⁵ Article 18, 2.

⁷⁴⁶ Act 86-013 of 26 February 1986.

⁷⁴⁷ Amoussou, *Etude nationale*, cit., p. xxvii.

the main reason which induces parents to send their children to work in order to guarantee them some economic security. Moreover, the fact that primary education is not free encourages child labour. Traditional beliefs and practices reinforce this economic rationale. Traditionally, sending children to work is considered to be an appropriate educational tool. The system of *vidomègon* applied in Benin reflects this belief. This consists of placing the children in domestic service in more wealthy families in Benin or in other countries of Western and Central Africa. Girls constitute 90-95 percent of the children affected by this practice. They are often subject to exploitation, abuse and violence. In the North, the phenomenon of child labour is also linked to the practice of placing children in Koranic schools. Children *talibé* in the Koranic schools called *Alfa* are forced to work to pay for their education and food.

Poverty is also a factor behind the trafficking of children. Parents believe that giving their children away can ensure better prospects for them. However, this practice is old-rooted. Benin has been affected by since the monetarisation of trade. Today, trafficking has taken international dimensions and involves the whole Western and Central Africa. Many children are sent to Nigeria, Côte d'Ivoire, Gabon and Cameroon, where they are used and exploited in plantations, as itinerant traders or domestic workers.⁷⁴⁸ The phenomenon has increased in the recent years. In 1995, the number of trafficked children that were stopped at the Benin border was 117, 413 in 1996 and 802 in 1997.⁷⁴⁹ Child Labour News Service released a report in July 2000 according to which 49,000 Beninese children victims of trafficking were living abroad, of which 61 percent were boys and 39 percent were girls. Most of these children were working on plantations in Côte d'Ivoire or as domestic workers in Gabon. A study carried out by Anti-Slavery International in 1999 reveals that girls are more affected by trafficking than boys because the demand for domestic workers and market traders is higher and also it is assumed that they would be more docile as they become older. Moreover, the cost of a wedding for daughters has been identified as a possible factor in the parents' decision to send their daughters away instead of their sons.

Various measures have been devised to deal with the problem of child labour, including a cooperation agreement with the ILO in 1996 for the implementation of the International Programme for the Elimination of Child Labour (IPEC). The government is also taking part in an ILO project on trafficking, which involves other eight countries and has

⁷⁴⁸ *Report Combating Trafficking in Children for Labour Exploitation in West and Central Africa*, IPEC, ILO, Geneva, 2001.

⁷⁴⁹ Anti-Slavery International, *Synopsis of 1999 Report on the Trafficking of Children between Benin and Gabon* at <http://www.antislavery.org/archive/other/trafficking-benin-synopsis.htm>

concluded bilateral agreements with Gabon, Togo and Nigeria to reinforce border control and to repatriate trafficked children. Furthermore, a proposal to review all legislation relating to children rights and to draft a comprehensive children's code has been presented. Moreover, as a result of the NGOs' sensitisation, the government started a formal investigation into the arrival of Etireno on the coast of Benin on 17th April, which was allegedly carrying trafficked children. This report was subsequently given to UNICEF and the NGO *Terre des hommes*. In addition, the National Commission on Children's Rights developed an action plan to prevent child trafficking, however, in March 2002, it was still waiting for funding from the Government.

The structural adjustment policies introduced since 1989 have had a negative impact on the enjoyment of social and economic rights, similar to the case of in Zambia. Since 1996, structural adjustment measures have led to an increase of the GDP of 5.5 percent, limited the inflation rate to 3 - 3.5 percent and reduced the budget deficit. However, they have also had negative repercussions in terms of living conditions of Beninese people. The privatisation and liquidation of public enterprises have provoked huge redundancies. Between 1982 and 1994, 6,659 posts were lost. In the public service, the number of employees has decreased from 50,000 in 1989 to 32,241 in 1997.⁷⁵⁰ A reduction in the number of posts in the public and parastatal sectors have in turn determined a growth of the informal economy and a decline of wages in rural areas, due to the excess of labour supply as a result of the downsizing of the public and parastatal employment. Today, more than 90 percent of the non-agricultural labour force works in the informal economy, which absorbs around 40 percent of the entire labour force. In 1979, the informal economy employed 34 percent of the economically active population. In 1992, this had reached 41 percent.⁷⁵¹ Structural adjustment policies have therefore impinged upon the right to work, restricting employment opportunities, as well as rights at work, which are easily denied to informal workers. Moreover, the right to health and education are often sacrificed in a political economy based on the reduction of public expenses. Primary education is not free and, in recent years, the overall allocation to health has diminished.⁷⁵²

Although the Constitution is extremely detailed as far as the protection of social and economic rights is concerned, the government of Benin has little room to manoeuvre in order

⁷⁵⁰ Amoussou, *Etude nationale*, cit., pp. ii-iii.

⁷⁵¹ *The Labor Market in Benin*, submitted by CORCEDO (Centre d'Orientation de Recherche en Compétitivité, Economie et Décisions Organisationnelles), Institut National d'Economie, Cotonou, Bénin available at <http://www.globalpolicynetwork.org>

⁷⁵² Concluding Observations of the Committee on the Rights of the Child: Benin, 24/08/99 CRC/C/15/Add. 106, para. 24.

to freely decide its policies. With a total external debt accounting for more than 60 percent of its GDP and an annual budget deficit completely financed by external resources, the government of Benin is left with very limited scope to independently decide on how to deal with poverty reduction and to meet the social needs and constitutionally recognised rights of its population.

10.2.2 The Role of the Constitutional Court and the Beninese Human Rights Commission in the Protection of Human Rights

i) The Constitutional Court

The work performed by the Constitutional Court is one of the main indicators that the notion of rights and freedoms and more generally, the rule of law regulate both the relationship among political and institutional actors as well as the relationship between the state and its citizens. The Constitutional Court was established in 1993 and is regulated by Act No. 91-009 of 4th March 1991, *portant Loi organique sur la Cour Constitutionnelle*, and by Decrees No. 94-11 and 12 of 26th January 1994, as well as by internal regulations. From 1991, when the functions of the Constitutional Court were exercised by the *Haute Conseil* until 31st December 1999, three hundred and eighty one cases were brought before the Constitutional Court. One hundred and eleven were brought by public actors (legislature, MPs, an executive body or a public institution), some two hundred and seventy were presented by private actors (such as individuals, associations, trade unions).⁷⁵³ The reason for the relatively high number of cases, which have increased over the years, is linked to the ease with which appeals can be made to the Court and the broad range of individuals entitled to bring a case. The procedure is simplified and is free to appellants, who include individual citizens and non-citizens,⁷⁵⁴ and they do not have to demonstrate an interest in order to make a claim.

As a result of the independence demonstrated in its decisions,⁷⁵⁵ the Court has rapidly gained the confidence of public and private institutions and has thus indirectly encouraged the submission of appeals. As a result, it has become the most respected institution in the

⁷⁵³ *Rapport de la Cour Constitutionnelle du Bénin*, March 2000 available at www.accpuf.org/congres2/II-RAPPO/rapport_ben.pdf

⁷⁵⁴ In 1997, the Constitutional Court overruled a previous decision of the *Haut Conseil de la République* of 1992, which had declared that it could not receive requests from non-citizens. With the decision DCC 97-045 of 13th August 1997, the Court declared that it could receive a case presented by a Danish citizen on the basis of Article 39 of the Constitution, which states that "*Les étrangers bénéficient sur le territoire de la République du Bénin des mêmes droits et liberté que les citoyens béninois*".

⁷⁵⁵ One example of this independence are the decisions to annul the election of Soglo's wife as a parliamentary deputy and, in 1996, to require Kérékou to re-take his oath of office because he had not pronounced several words.

country. The judgements concerning fundamental rights and freedoms delivered between 1991 and 9th March 1999 concerned an extremely wide range of human rights and freedoms, including the right to integrity of the human person, the right not to be subjected to cruel, inhumane or degrading treatment, freedom of movement, the right to defence (in particular, the right to be heard), the right to be judged within a reasonable time limit, the right to property, the freedoms of assembly and association, the freedom of religion, the principle of equality before the law and the inviolability of domicile. An interesting decision is DCC 16-94, as the African Charter was applied against the government for the first time in Benin and probably in the whole of sub-Saharan Africa.⁷⁵⁶ The case concerned an *arrêté* of the Ministry of Interior of 22nd November 1993 concerning the conditions and modalities of registration of the associations. This provided that only one development association could be registered for each administrative entity, that the registration was subordinated to an investigation on morality, and finally, if the application for registration was rejected or rescinded, the relevant associations were immediately obliged to cease their activities and to liquidate their assets within one month. The Court judged this decree to be unconstitutional, because, the limitation of the exercise of the freedom of association, violated not only Articles 25 and 98 of the Constitution, but also Article 10 of the African Charter.

On several instances, the Court has ruled in favour of individual citizens. An interesting example, due its political weight, can be found in the decision DCC 95-029 of 17th August 1995. This related to the challenge by Colonel Soulé Dankoro to the constitutionality of the decisions taken by the President of the Republic on the resignation he had submitted in order to present his candidature in the legislative elections of March 1995 ex Article 81(3) of the Constitution and the subsequent disciplinary measures. The President of the Republic had not replied to the appellant's resignation by 1st March 1995 when he presented an appeal to the Court. It was only on 8th March that a decision was communicated to Mr. Dakoro according to which his resignation was accepted starting from July 1995. Basing its decision on Article 81(3) of the Constitution, the Court declared that the decisions of the President of the Republic were not in conformity with the Constitution. The reasoning of the Court was based on the consideration that the appellant inferred that his resignation was implicitly rejected from the silence of the President and that the President's successive acceptance "*prive de son objet cette démission*", since its effect would only begin after the elections had taken place. The delay with which the President responded to the appellant's

⁷⁵⁶ Magnusson, *Legitimizing*, cit., p. 39.

resignation showed the intention to prevent the appellant from presenting his candidature and this constitutes a violation of Article 13(1) of the African Charter and Article 81(3) of the Constitution. The former provides for the right of all citizens to freely participate in the government of their country either directly or through freely chosen representatives. The latter recognises the right of the members of the armed forces and public security to resign if they wish to become a candidate in the elections.

The Constitutional Court has also played a significant role in solving conflicts between state institutions. This represents an extraordinary change in respect to the past when institutional conflicts were solved by the army and, after the coup d'état of 1974, by the Central Committee of the Party. Since 1990, institutional conflicts, involving both substantial and procedural issues, have been solved by the Constitutional Court and the relevant decisions have been respected by all of the institutions involved. The first of these decisions dates back to 23rd December 1994 when the Constitutional Court ruled on a dispute opposing the government and the Assembly on the establishment of the CENA for the organisation of the legislative elections of 1995 and the presidential elections of 1996. The apex of the institutional crisis was reached in the same year on the issue of the budget. The question related to the respective competences of the legislature and the executive and the crises began when the government presented the budget after the beginning of the fiscal year. For its part, the Assembly voted for an increase of civil servants' salaries, pensions and scholarships higher than that provided by the government, which in turn, adopted its own budget on 2nd August by *ordonnance* on the basis of Articles 41, 147 and 68 of the Constitution. In particular, it made use of the emergency powers conferred by the Constitution under Article 68, justifying it by the non-compliance with the international commitments taken under the SAP, to which it is bound to respect by virtue of Article 147, with the risk that the Assembly's budget could cause the funding of a series of development projects to be lost. Moreover, it argued that salaries, pensions and scholarships were subject to regulatory and not to legislative discipline and that the budget voted by the Assembly violated Article 107 of the Constitution, which establishes that the balancing of the budget must be ensured (Article 110). The Assembly set the date of 5th August as the deadline for the exercise of the emergency powers and asked the Constitutional Court to declare the unconstitutionality of the exercise of these powers and the effectiveness of the budget that it had voted. After a series of decisions, the Court confirmed the new deadline of 24th September and that the budget voted by the Assembly was unconstitutional because salaries, pensions and scholarships fall under the regulatory sphere. However, it affirmed that it did not violate either the constitutional

provision imposing the balancing of the budget or international agreements. These decisions put an end to a serious crisis, similar to those which would have been resolved by the army in the past. Moreover, it gave a clear indication to the government of the necessity to involve the legislature in the conclusion of international economic agreements.

In this regard, it has to be taken into account that several decisions were delivered against measures taken in application of the Structural Adjustment Programme. One decision was DCC 18-94 concerning the interministerial *arrêté* no. 93-068/MFPRA/MFC/DC of 4th August 1993 *portant fixation des modalités et programmes du test de sélection des Préposés des Douanes*. The appellant, Mr. Ahossi Comlan Basile, challenged the constitutionality of this *arrêté*, which only granted the officials of the Ministry of Finance the possibility of participating in the relevant test for hiring. In particular he claimed that this decree violated Article 8(2) of the Constitution and Article 13(2) of the African Charter, which sanction the equal right of all individuals to access public functions. The Court stated that even if the exigencies of the Structural Adjustment Programme and the “plethoric” number of agents in the Ministry of Finance can justify why the relevant test is not open to all citizens, this test must be accessible to all the Permanent State Agents of the relevant category. Therefore, the limitation to the agents in service at the Ministry of Finance was judged as a discriminatory measure.

In at least three decisions, the Court applied the constitutional provisions concerning citizens’ duties. In this regard, the President of the Supreme Court of Benin, Mr. Abraham Zinzindohoue wrote: “*Nous mettons généralement l'accent sur les droits de la personne uniquement. Mais les droits et les devoirs sont intimement liés; en tous cas, les uns sont les pendants des autres. De sorte que l'on ne saurait parler des droits humains sans évoquer les devoirs. A preuve, le titre II de la Constitution du 11 Décembre 1990, qui proclame les droits et libertés publiques, est intitulé: “Des Droits et Des Devoirs de la Personne Humaine”.*”⁷⁵⁷ The relevant decisions are DCC 96-025, 96-034 and 96-070. The first of these decisions related to a complaint made by two “*élèves agents des forces de sécurité publique*”, who were struck off with a decision of the Ministry of Defence in 1984 and were reinstated after presenting an administrative case. They applied to the Constitutional Court because their reinstatement was not implemented. The Court ruled that the refusal by the General Director of the National Police to reinstate the two appellants was contrary to Article 35 of the

⁷⁵⁷ Quoted from the letter of 15th March 1999, which accompanied the Constitutional Court’s decisions covering the period January 1997-9th March 1999, which were sent to me through the Italian Ambassador for Benin and Nigeria.

Constitution, which states that "*Les citoyens chargés d'une fonction publique ou élus à une fonction politique, ont le devoir de l'accomplir avec conscience, compétence, probité, dévouement et loyauté dans l'intérêt et le respect du bien commun*". The second decision related to the refusal of the Director General of the Office of Post and Telecommunications to implement the directives of the Ministry of Culture and Communications concerning the reinstatement following the amnesty of a person, who had lost his job for political reasons and was exiled. As in the preceding case, the Constitutional Court declared that this refusal was a violation of the duties imposed on the Administration by Article 35 of the Constitution.⁷⁵⁸ A similar conclusion was reached in the third case, which arose from a claim of unconstitutionality against a letter of the Director General of the *Société Béninoise d'Electricité et d'Eau*, in which the reinstatement of Mr. Amah Arouna was refused after his suspension was raised with decision of the Council of Ministries.

These decisions reveal that despite the rhetoric, in reality, there is no particular African notion of "duty" in the Beninese constitutional system. The reference made to the concept of duty in Article 35 and in these judicial cases has nothing to do with the discourse on African communitarian social organisation and the complementary emphasis on the duties that individuals owe to the community. In fact, what was at stake in these three cases was the violation by the Administration of the duty to implement decisions taken by a higher authority. Duties, like rights, are often exploited as rhetorical tools and they are employed for their evocative force.

ii) The Beninese Human Rights Commission

Another organ vested with the task of human rights protection is the *Commission Béninoise des Droits de l'Homme* (CBDH). This is a governmental organisation set up with the Act No. 89-004 of 12th May 1989, which is endowed with its own funding and administration. The creation of this Commission is due to a large extent to the lawyers from the Benin Bar Association, who proposed the creation of a mechanism to implement the African Charter of Human and People's Rights, which was ratified in 1986. The establishment of a national body, as required by Article 26 of the African Charter, was formally recommended during an international conference on human rights held in April 1988 under the auspices of the African

⁷⁵⁸ In this case the decision was also based on Article 34 of the Constitution, which provides that "*Tout citoyen béninois, civil ou militaire, a le devoir sacré de respecter, en toutes circonstances, la Constitution et l'ordre constitutionnel établi ainsi que les lois et règlements de la République*".

Jurists Association. The Bar Association even created a committee with the task of drafting a proposal and lobbying with the MPs to persuade the Assembly to pass a law in this respect.⁷⁵⁹

The composition of the Commission reflects the guidelines contained in the Paris Principles according to which human rights national institutions shall ensure the “pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights”. The Beninese Commission is composed of forty-five members, three of whom are members by right: a magistrate, a representative of the Bar Association and a representative of the Organisation of Doctors. One third are representatives of NGOs and the remaining two-thirds are individual members. These include lawyers, doctors, magistrates and teachers. All of the Commissioners work on a volunteer basis. In conformity with the Paris principles, the independence of the Commission is also ensured by the system of funding, which is based on members’ shares, revenues deriving from the Commission’s activities, gifts, legacies and subsidies (Article 13).

The Commission has the task of “promoting and safeguarding human rights” (Article 4). To this end, the law provides that the Commission’s activities shall consist of teaching and making human rights instruments known among the population, proposing measures to public authorities to promote and protect human rights, assisting in the ratification of human and peoples’ rights international instruments, assisting the authorities in the elaboration of reports to be submitted according to the international instruments to which Benin is a party and making recommendations to the Government to enact the deliberations of the UN and the OUA organs or any international governmental or non-governmental human rights institution. Its educational activities include radio broadcasts and seminars. Finally, as also provided by the Paris principles, the Beninese Commission is also entrusted with what the Principles define as a “quasi jurisdictional competence”. The Commission receives complaints by individual citizens as well as NGOs and works as a conciliator between the citizen and public powers (Article 4(b)). In collaboration with the concerned administration, it can pursue the means through which to put an end to the violation and/or obtain a “fair and equitable reparation”. It can conciliate between the administration and the claimant. If the conciliation fails, it can suggest measures, including judicial appeal in which case it can act as a civil party. It can also bring a case before the judicial authority on behalf of the complainant (Article 12). In fact, upon receipt of a complaint, the Commission appoints one of its members, who carries out an investigation. The Commission enjoys broad investigative

⁷⁵⁹ Human Rights Watch, *Protectors or Pretenders, Government Human Rights Commission in Africa, Benin*, at <http://www.hrw.org/reports/2001/africa/benin/benin.html>

powers, which allow it to have unrestricted access to reports, registrars, official documents and premises. It subsequently drafts a report. The agent of the human rights violation is then contacted in writing and, if this person does not respond, it issues a press release or organises a media campaign.

In spite of its broad powers, the record of the Commission is rather disappointing. The CBDH was only set up in March 1990 by Soglo, the newly elected Prime Minister of the transitional government following the National Conference. Despite the presence of representatives of human rights NGOs in the Commission, the fact that it enjoys a high degree of independence, the breadth of its powers and a conducive political climate, the Commission has confined itself to educational activities and in electoral monitoring. Act No. 98-034 of 1999 establishing general rules for elections in the Republic of Benin provides that one member of the Commission must be also a member of the CENA and that a CBDH representative must participate in each Provincial Electoral Commission, which represents CENA at the provincial level. It is likely that the presence of a very active and efficient Constitutional Court has eroded the significance of the Commission. Only two cases have been reported recently in which the CBDH has intervened to protect and not only to promote human rights. In December 1997, the Commission presented a complaint before the judiciary on behalf of Tohon Evariste, a mechanic who was beaten and wounded by his employer, and was also a party to his complaint. In January 1998, it protested against the prospected expulsion of forty refugees from Congo. As a result of its intervention, the expulsion was suspended. However, paradoxically, the most important stand on human rights violations remains the support given to the government of Togo in 1999 in its attacks against Amnesty International, which had reported on political killings in Togo.⁷⁶⁰ This stand was contradicted by the report presented by a joint UN-OUA Commission, which investigated the allegations that hundreds of bodies of victims of the Togolese security forces were carried off on Benin's beaches in February 1998. The report ascertained the existence of a systematic violation of human rights in Togo.

⁷⁶⁰ Human Rights Watch, *Protectors or Pretenders*, Benin, cit.

10.2.3 The Vitality of Civil Society

The place that human rights have in contemporary Benin also depends to a large extent also on the attachment demonstrated by Beninese civil society to the values enshrined in the Constitution. The press, despite the disappearance of a certain number of titles and the irregular appearance of others, has continued to be very critical and avidly read by the population. The interest of the Beninese in politics is also expressed by their readiness to exercise civil and political rights, which they had not been in a position to exercise until 1990. Observers have remarked a peacefulness of the voting process and the high turn-out of voters (in the latest legislative elections it amounted to 73.62 per cent of those having the right to vote). However, a deeper reading of the working of Benin democracy shows that the rationale, which moves the different actors, from ordinary citizens to politicians, resembles that of the past. In particular, as Banégas has remarked, "*la consolidation démocratique et la subjectivation citoyenne s'opère paradoxalement au Bénin dans le creuset des logiques clientélares et dans la matrice plus générale de la «politique du ventre»*".⁷⁶¹ The "politics of the belly", which characterised the authoritarian period, is the form through which democracy express itself today. Political candidates visit their constituency distributing and promising money and are welcomed by villagers. This could be seen as a sign of a malfunctioning of democracy. However, it could be argued, as Banégas does, that in fact this is a path that initiates to the rules of political pluralism and a modality of appropriation "*par les bas*" of democracy. Political competition is perceived as an occasion for citizens to reverse the power relations with politicians. The material advantage which can be derived from democratic competition is actually seen as corresponding to a politicians' moral duty to redistribute wealth and to redress the enrichment of a few. The citizens then vote regardless of the money received by the different candidates and on the basis of considerations other than the material benefits. The regional origins of the candidates and their perceived religious and moral qualities⁷⁶² are determining factors. Moreover, Beninese citizens have proved to be very

⁷⁶¹ R. Banégas, "Marchandise du vote, citoyenneté et consolidation démocratique au Bénin", in 69 *Politique africaine*, 1998, p. 75.

⁷⁶² The moral qualities are linked to concepts which are specific to Beninese culture and which relate to the *xomé* of citizens, i.e. to their belly meant as innerness, see *ibidem*, pp. 83-86. Modesty is a quality which is valued and this also explains the election of Kérékou in 1996, who redeemed himself with his act of public humiliation at the National Conference. Religion expresses itself not only in the status of religious personalities such as voodoo priests in villages and which is one of the reasons for the rehabilitation of their cults in 1989 but also in the force of persuasion that the religious language used in the political discourse has on citizens; see K. Elwert-Kretshmer, "*Vodoun et contrôle social au village*", in 59 *Politique Africaine* 1995, pp. 102-119. This is a characteristic that Benin shares with Zambia and with other African countries. Kérékou like Chiluba makes recourse to religious images, which in the case of Kérékou have Pentecostal references. Kérékou exalted Christianity against voodoo, which he presented as a dangerous heritage of the military rule and his adversary

critical of candidates. In 1995, only seventeen MPs were re-elected. However, regionalism is the basic criterion used to vote. The "*fils du pays*" is the candidate chosen, independent of the origins of the head of the party.

The vitality of Beninese civil society is demonstrated by the number of trade union organisations and NGOs. From the existing five confederations, four were set up after the reintroduction of democracy. However, trade unions are largely confined to the public sector. The success of the human rights discourse is further witnessed by the number of Beninese NGOs formed during the transition period, which are devoted to human rights promotion and education.⁷⁶³ Their efforts are combined with the action of the government, which has introduced human rights courses at school. Special courses on human rights have also been set up by local NGOs and seminars are held for local officials and for the populations in towns and villages using the different national languages. Human rights education is also pursued through radio broadcasts and publications. Moreover, people are trained at local level to become legal trainers. Human rights NGOs have played a major role during the elections of 1995 promoting legality and tolerance, together with Archbishop de Souza and other religious personalities.⁷⁶⁴ They have organised seminars, conferences and workshops on the exercise of the right to vote. The *Institut des droits de l'Homme et de promotion de la démocratie, La démocratie au quotidien* of Maurice Glélé Ahanhanzo and Archbishop de Souza organised a national seminar on the "Electoral Process", which was broadcast on the radio in the different national languages and its acts ("*L'éducation des populations en matière de vote*") were published.⁷⁶⁵

Two Beninese NGOs also investigate on human rights violations, mediate and bring actions to court. This is the case of the *Ligue Béninoise des Droits de l'Homme*, which is close to the Communist Party, and the *Association pour le Développement des Initiatives Villageoises* (ASSODIV). Finally, the freedom in which these organisations operate and the collaboration which takes place with the government should not be overlooked, particularly

Soglo, who rehabilitated the cults voodoo which were prohibited under the military rule. Moreover, he emphasises his double conversion, i.e. to religion and to democracy, and makes parallels between God and democracy. Again, the functioning of democracy in Benin develops according to its own forms where different languages, in this case that of democracy and religion, co-exist. On the link between religion and political power, see C. Strandsbjerg, "Kérékou, God and the ancestors: Religion and the Conception of Political Power in Benin", in 99 *African Affairs*, 2000, pp. 395-414.

⁷⁶³ See *The Status of Human Rights Organizations in sub-Saharan Africa. Benin* at <http://www1.umn.edu/humanrgts/africa/benin.htm>

⁷⁶⁴ See C. Mayrargue, "Les religieux et les élections législatives du mars 1995 au Bénin", in 58 *Politique africaine*, 1995, pp. 157-162.

⁷⁶⁵ On the 1995 elections, see Gbégnonvi R., "Les législatives de mars 1995", in 59 *Politique africaine*, 1995, pp. 59-69.

as the latter is often willing to provide information of alleged cases of human rights violations and to take the necessary measures as well.

CONCLUSIONS

The study carried out on the constitutional history of Zambia and Benin has shown that, despite some relevant similarities with the constitutional experience of the 1960s, the constitutionalisation of human rights in the 1990s presents some significantly new features. Resemblances and differences can be identified with regard to the actors and dynamics of interests and values, which underlie the renewed protection of individual liberties according to the principles of constitutionalism, as well as to the typology of rights protected and the mechanisms aimed at guaranteeing their implementation. What has certainly changed is the global context in which the constitutions of the 1990s were adopted. The increasing interconnection of markets, peoples and institutions, as well as a set of ideas and values dispersed widely due to this interconnection, are all aspects of globalisation, which have influenced both the re-introduction of liberal-democratic constitutions and also the degree of which constitutionally protected rights are implemented.

In the light of these findings, it should now be possible to respond to the first question raised in the Introduction of this thesis, namely whether or not the renewed constitutionalisation of individual (liberal) rights and freedoms is explicable in terms of "*mimétisme*". In Part I and in Chapter 7, it was shown how the constitutional protection of civil and political rights in the independence constitutions was a result of this process, which was an expression of a relationship of (cultural, political and economic) dependence between the colonial powers and the African nationalist leaders. The constitutional developments of the 1990s can still be described to a certain extent in these terms. Current constitutions are linked to a situation of dependence of sub-Saharan Africa on non-African actors. In the 1960s, these actors were the colonial powers, whereas today they are the Bretton Woods institutions and Western donor countries.⁷⁶⁶ As seen in the preceding chapters, since the late 1980s, the community of donors and international financial institutions has started condition aid with respect to democratisation and good governance. The inability of African states to survive without the economic and financial support of the IMF, the World Bank and Western countries has made it virtually impossible for African leaders not to pledge its adherence to the principles of liberal-democracy. The fall of the Soviet system has reinforced the weight of this conditionality also from a strictly legal point of view. Scholars have used the image of the market to describe legal change.⁷⁶⁷ If we apply this metaphor to sub-Saharan African

⁷⁶⁶ In practice, however, the actors have not necessarily changed. In particular, in the case of Francophone Africa, the major donor is the former colonial power.

⁷⁶⁷ See U. Mattei, "Efficiency in Legal Transplants: An Essay in Comparative Law and Economics", in 14

constitutional changes, it could be argued that these changes have taken place in the context of a monopoly of constitutional cultures. With the decay of communist regimes in Eastern Europe, no alternative models exist to the universalistic claims of the liberal democratic paradigm. An undeniably positive record of liberal-democracies in terms of internal cohesion, peace, stability and development has strengthened these claims. Therefore, given the international context, sub-Saharan African states find themselves in a situation where allegiance to the liberal-democratic model is a condition for being recognised as legitimate by the international community or, more precisely, by the group of countries and institutions which wield political, economic and financial power within the international community. As in the 1960s, the constitution has played the role of a sort of "*carte de visite*", used according to a strategy of "*marketing constitutionnel*".⁷⁶⁸

Nevertheless, the dynamics underlying the constitutions of the 1990s cannot be interpreted exclusively, as a manifestation of African political and economic dependence and, therefore, the concept of "*mimétisme*" only partially reveals the nature of the current constitutional phase. The continued employment of this notion to explain African constitutionalism is often linked to the tendency not to consider or underestimate the changes occurred within African societies since decolonisation and to recognise their impact on African constitutional developments. The return to liberal-democratic constitutionalism is also the outcome of a long process (beginning with colonisation), in which African civil society have been protagonists. The role of civil society in the constitutional changes of the 1990s constitutes the major difference with the processes that led to the adoption of the independence constitutions. In Chapter 9 and 10 it was shown how the 1991 Zambian and the 1990 Beninese Constitutions were a response to demands for democracy and rights put forward by civil society. These claims were the result of a process of "appropriation" of the human rights language, which started with the fight against colonisation when the rights-discourse was instrumental to liberation from colonial domination. This process continued in the aftermath of decolonisation. In the early 1960s, some voices, albeit a minority, were already raised in the defence of human rights. In 1961, African lawyers, convened in Lagos demanded African governments to adopt an African human rights convention and to constitutionally entrench fundamental rights. In the 1970s, the African Bar Association, often in collaboration with the ICJ, organised various seminars on human rights, the first human

American Journal of Comparative Law, 1994, p. 8 and U. Mattei, *Comparative Law and Economics*, The University of Michigan Press, Ann Arbor, 1997, p. 26.

⁷⁶⁸ L. Sindjoun, "Les nouvelles constitutions africaines et la politique internationale: contribution à une économie des biens politico-constitutionnels", in *Afrique 2000*, 1995, p. 39.

rights groups were formed and the idea of elaborating an African instrument on human rights was submitted to the OUA.⁷⁶⁹ The case studies of this thesis have also shown that human rights concerns did not appear in the late 1980s for the first time. The Zambian constitution-making process of 1972, which led to the constitutionalisation of unipartism, witnessed the expression of a popular concern for individual liberties. In Benin, the *Conférence des Cadres* in 1979 demanded the reintroduction of a liberal democratic system and since the 1980s, the legal profession has asked for the establishment of a Human Rights Commission. It is true, however, that until the mid-1980s and early 1990s only a small section of society put forward claims for rights. It is only since the late 1980s, that trade unions, students and churches have expressed their discontent and opposition in human rights terms. This evolution bears upon the growth of the international human rights regime and movement, in which Africa played its part. The adoption of the African Charter and the initiatives of African lawyers gave a significant boost to the 'domestication'⁷⁷⁰ of the idea of human rights. The fact that the vehicles through which the relevant idea was being introduced were African or, in the case of international human rights standards, were instruments which witnessed the participation of African countries, gave human rights the cultural legitimacy that was absent in the 1960s and which was one of the obstacles to their incorporation. It is symptomatic that when human rights were discussed (and claimed) during the constitution-making processes of both Zambia and Benin, reference was always made to both the African Charter and international human rights instruments.

The increasing integration of Africa in the transnational exchange of ideas and information has been the latest contribution to this process of incorporating human rights in the set of concepts, through which African civil societies interpret and express their relationship with political power. This integration did not exist in the 1960s when exposure to events occurring abroad was limited to a small élite of individuals, who had the opportunity to travel to Europe as students or political leaders. Transnational migration, the development of mass media, the reception of foreign radios, Western tourism⁷⁷¹ have exposed a growing number of Africans to a set of value-systems and ideas, including human rights, which they were not necessarily acquainted with. Information about the political and socio-economic conditions of other peoples, as well about political events occurring in other countries has

⁷⁶⁹ Hyden, *The Challenges*, cit., pp. 263-264.

⁷⁷⁰ The term domestication signifies the integration of human rights in the culture of a given society in such a way to condition individual practices and institutional actions.

⁷⁷¹ See J.-P. Daloz, "Le temps mondial au sud du Sahara. Des représentations à la ressource politique", in Z. Laïdi, *Le Temps mondial*, Editions Complexe, Bruxelles, 1997, pp. 147-149.

also increased since the 1960s. The consequent awareness of the injustices suffered in other parts of the world and the knowledge of the victories that other peoples had obtaining from their struggle against oppression and misrule has enhanced a sentiment of universally shared values. This explains the reaction of the Beninese against the “minimalist” approach of France to democratisation in their country. As we have seen in Chapter 10, French policy towards Kérékou was harshly criticised by the Beninese in the name of the universality of the principle of democracy.

The metaphor of “legal irritants” (adapted to a situation in which legal change is influenced by international law and not foreign national law) can help us to understand the process described so far. The liberal idea of human rights has continued to ‘irritate’ African societies even during the Kaunda and Kérékou’s regimes and this irritation has been reinforced by the developments that occurred in the international and regional legal regimes on human rights and the growth of a transnational human rights movement with an increasing number of international and national NGOs working in the field of human rights promotion in Africa. These processes have ensued in the conceptualisation by the most politically aware sections of African civil societies, of human rights as a universally valid instrument of emancipation from oppressive and inefficient governments. In turn, the legal space has been ‘irritated’ by the developments that have occurred in the political discourse of civil society and such ‘irritation’, coupled with the pressures exerted by foreign actors on African governments, has led to the adoption of liberal-democratic constitutions in the early 1990s.

It should be noted that the perception by civil society (beyond the circles of human rights activists) of human rights as a valid instrument of emancipation was certainly conditioned by the spread of the concept of human rights through the various channels seen above. However, material conditions and interests determined the actual impact of the idea of human rights on Zambian and Beninese civil societies and notably the perception of human rights as a universal value. The incorporation of human rights in their political discourse is linked to the worsening of socio-economic conditions and the failure of the state to guarantee material security. In fact, in Zambia and Benin, opposition to the state and rights-claims came from those sections of civil societies which were more economically dependent on the state, such as unionised workers of the public and parastatal sectors and students. The claim for rights was determined by the recognition of the empowering and mobilising force of the language of human rights, as well as the instrumental value of civil and political freedoms to obtain the level of development, which African states had always promised but never achieved.

In conclusion, if the majority of the independence Constitutions were constitutions “*extroyées*”, the constitutions of the 1990s were “*negociées et conquises*”,⁷⁷² and the constitutional protection of individual liberties was manifestly a core demand in the constitution-making processes of both Zambia and Benin.⁷⁷³ As argued in Chapter 7, the effectiveness of a constitutional system depends largely on the fact that it is built and supported by the different socio-political forces existing in a country. This was not the case in the 1960s when the constitutions were drafted by colonial powers and the leaders of the independence movements. Conversely, the constitutions in force today are, to a great extent, an expression of democratic processes, which witnessed a consensus on the liberal-democratic form of state. In particular, the Beninese constitution-making process has provided the constitution with a solid foundation constituted by a “deal” reached by an extremely wide range of forces and interests. The strength of this deal also rests on the fact that it was achieved through forms (the Conference-modern version of a community’s gathering and discussion), symbols (the humility displayed by Kérékou) and an atmosphere (the spiritual dimension brought by Archbishop de Souza), which had also a meaning according to traditional political categories.

Therefore, the link existing between current formal constitutions and the ‘material’ constitutions explains the level of effectiveness of liberal-democratic principles and institutions today. In both Zambia and Benin parliaments exert their function of control on the executive and do not hesitate to oppose governmental decisions, including in their reaction to attempts to restrict individual liberties even in a context like that of Zambia under Chiluba, which was certainly not conducive to the expression of any form of opposition. Furthermore, the judiciary has provided evidence of its independence by ruling against the executive both in Zambia and Benin, and against the President himself in Benin (both Soglo and Kérékou). Popular participation in the elections, the flourishing of the mass media, which are not afraid to harshly criticise the government and the creation of various NGOs demonstrate that civil society value the exercise of political and civil liberties and in particular, the right to vote, expression, association and the press,⁷⁷⁴ even though it is true that

⁷⁷² L. Sindjoun, “Dynamiques de civilisation de l’Etat et de la production du politique baroque en Afrique Noire”, in 27 *Verfassung und Recht in Übersee*, 1994, p. 207.

⁷⁷³ A different question is that of the involvement of Western experts in the constitution-making processes, which show that a relation of cultural dependence still exists. Even in this respect changes have occurred. Within Africa, African institutions, like the *Conférence Nationale* of Benin, have been borrowed and African experts are invited to provide their advice on constitution-making and institution-building.

⁷⁷⁴ See the survey carried out on a number of African countries in M. Bratton and R. Mattes, “Africans’ Surprising Universalism”, in 12 *Journal of Democracy*, 2001, p. 107.

behind these phenomena economic interests can also be found. For example, the spread of NGOs is also due to the funding they obtain from Western NGOs and foundations.

We see that in Benin the government has generally demonstrated its respect for individual civil liberties and has even taken proactive measures to foster a human rights culture among the population, as requested by the Constitution, and to redress human rights abuses. However, the extent to which civil liberties were violated under the Chiluba government shows that African constitutionalism still faces some difficulties. The Chiluba period cautions against being overly optimistic about the domestication of the notion of human rights. The entitlement aspect of human rights seems to have been more easily internalised than the obligation aspect, particularly when this challenges a position of power. A personalised conception of power still exists and the personalisation of the democratisation processes has helped to preserve this political culture. Several sub-Saharan African countries have passed from the President-father of the nation to the President-champion of democratisation and the passage from Kaunda to Chiluba in Zambia is exemplary of this phenomenon.

Political culture does not change rapidly. We have already seen "Westernised" independence leaders, who used a political language drawn from the vocabulary of Western democracies, either changed this language or did not behave consistently once they achieved the responsibility of ruling their countries. Nevertheless, there is an important difference between the current situation and that of the post-decolonisation period. Political behaviours resembling the patrimonialist and authoritarian conception of the state of past leaders are not in fact a replication of this conception, but rather an adaptation of it in the face of a two-fold constraint. These include, on the one hand, a working system of check and balances and, on the other, the international and domestic reactions that human rights violations may endanger. In this regard, it needs be underlined that decades of oppression and injustice have lowered the level of endurance of the populations. The work that is being done by civil society groups to denounce abuses and to sensitise citizens to human rights, nurtures the democratic and human rights culture of African people and is destined to lower their degree of tolerance of illiberal practices. The question is to what extent all of the different components of African societies are actually reached by the spread of this culture, in particular, the rural populations, who have been at the margins of the movement that triggered the democratisation process in both Zambia and Benin, and the older generations who remain attached to traditional

logics.⁷⁷⁵ Ethnic allegiance is one of them. We have seen how voting is conditioned by ethnic allegiances and how even secessionist claims have even appeared in Zambia. However, the Zambian and Beninese constitutions do not deal with the political implications of these sentiments of ethnic membership and have avoided the recognition of any collective rights in the form of power-sharing mechanisms,⁷⁷⁶ with the only partial exception being the restored House of Chiefs in Zambia. The failure to recognise these sentiments may constitute a risk for human rights. Ethnic tensions may make governments feel compelled or may be used instrumentally by governments to limit individual liberties. The question of whether and how to acknowledge ethnic allegiances is certainly not an easy one because the recognition of traditional institutions can legitimise the exercise of power or norms which are not compatible with liberal rights. In any case, the approaches to the question of ethnic identity should vary according to the specific circumstances and nature of this identity in each country. It is certain, however, that this issue cannot be neglected.

Traditional culture also continues to constitute an obstacle to the effectiveness of the liberal concept of human rights in another respect, namely when rights should be applied in the private sphere. From this perspective, we have seen that the subjects whose rights are more vulnerable are women and children and the greatest cultural resistances concern the principle of gender equality. The underpinning tenets of the liberal model of human rights, i.e. autonomy and equality of all individuals, clash with a vital communitarian perception of gender relations. The introduction of the market economy, the commodisation of labour and land, urbanization and migration are among the factors that have eroded communitarian ties and put a process of individualisation in motion. Women and young people most clearly demonstrate their aspiration to liberate themselves from the communitarian structures that force them into a position of subordination. However, this process is not complete. The communitarian culture co-exists with the emergence of the person as an autonomous individual.⁷⁷⁷ Despite the pressures exerted by modernity, solidarity among the members of the group and the sense of the responsibility of the individual towards the group, which includes the respect for the norms that keep the community together, have not vanished.

⁷⁷⁵ According to Daloz, the level of political awareness is not really linked to the urban or rural residence but rather to age. The youth, independent of their educational level, show a greater concern regarding domestic malpractices and world politics than the elderly, who are still linked to regionalist logics and rivalries, see Daloz, *Le Temps mondial*, cit., 150.

⁷⁷⁶ On this issue, see M. Owusu, "Domesticating Democracy: Culture, Civil Society and Constitutionalism in Africa", in *39 Comparative Studies in Society and History*, 1997, p. 120 seq.

⁷⁷⁷ A. Marie (éd), *L'Afrique des individus*, Karthala Ed., Paris, 1999, p. 412.

Despite the progressive recommendations of the 1996 Constitutional Review Commission, the force of the communitarian culture, which is strongly defended by those who are guaranteed positions of privilege by it, explains how the Zambian Constitution only pays lip service to the principle of gender equality and still allows for the application of customary law as an exception to the principle of non-discrimination. Even in Benin, where the constitution sanctions the principle of equality between men and women, the latter do not enjoy an equal status as men due to traditional norms, practices and beliefs. Furthermore, African societies are not culturally monolithic. Women, or more precisely the most socially and economically advantaged ones,⁷⁷⁸ are actively combating to change aspects of the traditional culture and norms that impinge on the equal enjoyment of individual rights by women and men alike. Their action has already produced some results. The enactment of the new Family Code in Benin in 2002 represents a victory, albeit partial, of Beninese women. Arguably, the “irritation” exerted by the global discourse on women’s rights and the mobilisation of African women’s groups for gender equality will find a positive response when African societies at large acknowledge the socio-economic rationality of the principle of gender equality. As argued in Chapter 9, the growing number of women as heads of households and breadwinners challenge the assumptions behind the perceptions and norms, which accord women a subordinate status in respect to men.

The impact of culture on the effectiveness of the constitutional protection of human rights can also be identified with regard to the conception of justice introduced in the constitutional systems. Human rights are less culturally alien today than in the 1960s. A greater number of people express claims in human rights terms, value the exercise of individual liberties and demand their respect. Nevertheless, if one observes the level of ‘domestication’ of the system of justice imported with the notion of individual liberties, the picture is different. The inspiration of foreign procedures and the use of a foreign language, which is that of the former colonial power, makes the state system of justice a distant entity for the majority of people, who are neither acquainted with the former nor with the latter.⁷⁷⁹ The provision of a simplified (and cost-free) procedure in the Beninese Constitutional Court can be considered as a positive development in respect to the 1960 constitution. The high number of cases before the Constitutional Court of Benin has confirmed that the adaptation of

⁷⁷⁸ Certain scholars have accused the African women’s movement of poor representation, being mainly composed of African middle and high-class women linked to Western feminist groups, see Munalula, *Law as an Instrument*, cit., p. 133.

⁷⁷⁹ See N. Mvondo, “La crise de la justice de l’État en Afrique noire francophone. Études des causes du “divorce” entre la justice et les justiciables”, in 107 *Penant*, 1994, p. 208 seq.

borrowed institutions to local conditions is an effective way to ensure the functioning of the institution itself.

The ineffectiveness of the state system of justice in ensuring the implementation of rights also lies in the fact that it is culturally alien to a certain section of society because of its individual-centred and adversarial nature. This is confirmed by the vitality of traditional dispute settling mechanisms. In order for human rights to be implemented, this situation should be recognised and the question of how to make human rights concerns permeate the traditional conflict resolution mechanisms should be tackled. In light of the difficulties that individuals may face in demanding the judicial enforcement of their rights, the institution of human rights commissions is a positive innovation. Potentially, they can play an important role not only as institutions fostering a human rights culture, helping the process of implementation of international human rights standards, complementing the domestic system of checks and balances, but also by ensuring the implementation of individual rights. Human rights commissions not only have investigative powers which can be used on their own initiative, but they also have dispute settlement functions, whose procedures and techniques do not discourage individuals from presenting a complaint to courts, including obstacles which may arise due to their traditional legal culture.⁷⁸⁰ In order for this potential to be translated into a reality, human rights commissions need to have a broad range of competences (as laid down in the Paris principles) and to be guaranteed independence and adequate funding.

We have focussed thus far upon liberal rights and freedoms. However, a major difference between current Beninese and Zambian constitutions with those of the 1960s lies in the broader scope of the rights protected in the former. While the independence constitutions had a strictly liberal character, confining human rights protection to civil and political rights, the inspiration of the current constitutions goes beyond liberalism and mirrors the evolution which occurred in the international regime and discourse on human rights. This is particularly the case of the Constitution of Benin, which has an extremely wide spectrum of rights and freedoms protected ranging from first to third generation rights. The impact of the international human rights regime is even more evident from the preamble to the Constitution

⁷⁸⁰ We have seen, for example, how the Human Rights Commission in Benin can receive complaints by NGOs; it can conciliate and, in the case of failure of the conciliation, it may bring a complaint on behalf of the individual.

of Benin, which makes explicit reference to the African Charter and the UDHR and establishes not only that the African Charter is an “integral part” of the Constitution, but also that both the African Charter and international treaties and agreements shall have an authority superior to that of the laws. We have seen that the Constitutional Court has already used this provision and applied the African Charter in one of its decisions. It will be interesting to see whether it will also apply international human rights instruments in the future.

Upon closer inspection of the Zambian and Beninese Constitutions, we see that the extent to which the international human rights regime was actually used as a source varies and depends on the features of the relevant constitution-making processes. The 1990 Beninese Constitution was written *ex novo* in a context, like that of the *Conférence des Forces Vives*, where there was a prevailing desire on the part of the participants to mark the end of a long period of oppression. A robust and broad protection of human rights was the most obvious way of turning that page of the nation’s history.

A caveat is however necessary. Despite the fact that the Beninese Constitution recognises second-generation rights and the Zambian Constitution has introduced Directive Principles of State Policy, the model followed by Zambia and Benin is that of a liberal state with limited obligations in the socio-economic field. Liberalism not only in the political arena but also in the economic sphere is the prevailing global paradigm, which African states have explicitly been required to follow as laid down by international financial institutions and donor countries.⁷⁸¹ This paradigm has had very clear human rights implications.⁷⁸² The neo-liberal policies implemented in Zambia and Benin negatively impacted upon the effectiveness of the Beninese provisions on second-generation rights and the Zambian Directive Principles of State Policy. The structural adjustment policies imposed by the Bretton Woods institutions have made the social and economic conditions of people worse, as seen in Chapters 9 and 10. Nevertheless, these policies have provoked the emergence of a domestic discourse and claim for social and economic rights. If one compares the consultation process for the constitutional revision in Zambia in 1996 with the other similar processes which occurred in the previous years, one can see the rise in demand for a better guarantee of social and economic rights. Moreover, in both Zambia and Benin, African civil societies have started to express their opposition against Bretton Woods policies in the name of socio-economic rights. In Benin,

⁷⁸¹ See Y. Ghai, *Human Rights and Social Development. Toward Democratization and Social Justice*, Democracy, Governance and Human Rights Programme Paper Number 5, UNRISD, Geneva, October 2001.

⁷⁸² On the impact of economic processes linked with globalisation on rights, see Y. Ghai, “Rights, Social Justice, and Globalization in East Asia”, in J.R. Bauer and D.A. Bell (ed.), *The East Asian Challenge for Human Rights*, Cambridge University Press, Cambridge, 1999, p. 241 seq.

even the Constitutional Court has been asked to rule on SAP measures affecting the rights guaranteed by the Constitution. The growing attention to socio-economic rights in sub-Saharan Africa is evolving in parallel and is interlinked with an emerging attention to these rights among international NGOs, which have focussed for decades on civil and political rights.⁷⁸³ Interestingly, social concerns in Zambia are going beyond the civil society sphere and are also starting to affect state policies with the Parliament and the President starting questioning the privatisation programme requested by the IMF due to its high social costs. As in the case of civil and political rights, the degree to which second generation rights are implemented in the future will, arguably, be determined by the positions taken with regard to them by the State, civil society and the forces leading the economic processes of globalisation, and the power relations between these three.

⁷⁸³ Amnesty International has even changed its mandate, which now encompasses "all human rights".

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ANNEXES

CONSTITUTION OF ZAMBIA

PREAMBLE

(As amended by Act No. 18 of 1996)

WE, THE PEOPLE OF ZAMBIA by our representatives, assembled in our Parliament, having solemnly resolved to maintain Zambia as a Sovereign Democratic Republic;
DETERMINED to uphold and exercise our inherent and inviolable right as a people to decide, appoint and proclaim the means and style to govern ourselves;
RECOGNISE the equal worth of men and women in their rights to participate, and freely determine and build a political, economic and social system of their own free choice;
PLEDGE to ourselves that we shall ensure that the State shall respect the rights and dignity of the human family, uphold the laws of the State and conduct the affairs of the State in such manner as to preserve, develop, and utilise its resources for this and future generations;
DECLARE the Republic a Christian nation while upholding the right of every person to enjoy that person's freedom of conscience or religion;
RESOLVE to uphold the values of democracy, transparency, accountability and good governance;
AND FURTHER RESOLVE that Zambia shall forever remain a unitary, indivisible, multi-party and democratic sovereign state;
DO HEREBY ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

PART I

NATIONAL SOVEREIGNTY AND STATE

(As amended by Act No. 18 of 1996)

Article

1. [Declaration of Republic, sovereignty of people, supreme law and official language]
 - (1) Zambia is a unitary, indivisible, multi-party and democratic sovereign State.
 - (2) All power resides in the people who shall exercise their sovereignty through the democratic institutions of the State in accordance with the Constitution.
 - (3) This Constitution is the supreme law of Zambia and if any other law is inconsistent with this constitution that other law shall, to the extent of the inconsistency, be void.
 - (4) This Constitution shall bind all persons in the Republic of Zambia and all Legislative, Executive and Judicial organs of the State at all levels.

(5) The official language of Zambia shall be English.

2. [Public Seal]

The Public Seal of the Republic shall be such as may be prescribed by or under an Act of Parliament.

3. [National Anthem, National Flag, National Emblem and National Motto]

The National Anthem, the National Flag, the National Emblem and the National Motto shall be such as may be prescribed by or under an Act of Parliament.

PART II

CITIZENSHIP

(As amended by *Act No. 18 of 1996*)

Article

4. [Citizens of Zambia]

(1) Every person who immediately before the commencement of this Constitution was a citizen of Zambia shall continue to be a citizen of Zambia after the commencement of this Constitution.

(2) A person who was entitled to citizenship of Zambia before the commencement of this Constitution subject to the performance of any conditions following the happening of a future event, shall become a citizen upon the performance of such conditions.

5. [Children of citizens of Zambia]

A person born in or outside Zambia after the commencement of this Constitution shall become a citizen of Zambia at the date of his birth if on that date at least one of his parents is a citizen of Zambia.

6. [Persons entitled to apply to be registered as Citizens]

(1) Any person who --

(a) has attained the age of twenty-one years; or

(b) has been ordinarily resident in Zambia for a continuous period of not less than ten years immediately preceding that person's application for registration;

shall be entitled to apply to the Citizenship Board, in such manner as may be prescribed by or under an Act of Parliament, to be registered as a citizen of Zambia.

(2) An application for registration as a citizen under this Article shall not be made by or on behalf of any person who, under any law in force in Zambia, is adjudged or otherwise declared to be of unsound mind.

(3) Parliament may provide that any period during which a person has the right to reside in Zambia by virtue of a permit issued under the authority of any law relating to immigration shall not be taken into account in computing the period of ten years referred to in paragraph (b) of clause (1).

7. [Powers of Parliament]

Parliament may make provision for --

(a) the acquisition of citizenship of Zambia by persons who are not eligible to become citizens of Zambia under this Part;

(b) depriving any person of his citizenship of Zambia:

Provided that a person shall not be deprived of their citizenship except on the grounds that --

(i) that person is a citizen of a country other than Zambia; or

(ii) that person obtained such citizen by fraud.

8. [Citizenship Board]

Parliament may make provision for the establishment of a Citizenship Board to deal with any of the matters falling under the provisions of Articles 7.

9. [Cesser of citizenship]

(1) A person shall cease to be a citizen of Zambia if that person --

(a) acquires the citizenship of a country other than Zambia by a voluntary act, other than marriage; or

(b) does any act indicating that person's intention to adopt or make use of any other citizenship.

(2) A person who --

(a) becomes a citizen of Zambia by registration; and

(b) immediately after becoming a citizen of Zambia, is also a citizen of some other country; shall, subject to clause (4), cease to be a citizen of Zambia at the expiration of three months after such person becomes a citizen of Zambia unless such person has renounced the citizenship of that other country, taken the oath of allegiance and made and registered such declaration of their intention concerning residence as may be prescribed by or under an Act of Parliament.

(3) For the purpose of this Article, where, under the law of a country other than Zambia, a person cannot renounce his citizenship of that other country that person need not make such renunciation but may instead be required to make such declaration concerning that citizenship as may be prescribed by or under an Act of Parliament.

(4) Provision may be made by or under an Act of Parliament for extending the period within which any person may make a renunciation of citizenship, take oath or make or register a declaration for the purpose of this Article, and if such provision is made that person shall cease to be a citizen of Zambia only if at the expiration of the extended period that person has not then made the renunciation, taken the oath or made or registered the declaration, as the case may be.

10. [Interpretation]

(1) For the purpose of this Part, a person born aboard a registered ship or aircraft, or aboard an unregistered ship or aircraft of the Government of any country, shall be deemed to have been born in the place in which the ship or aircraft was registered or in that country, as the case may be.

(2) Any reference in this Part to the national status of the parent of a person at the time of the birth of that person shall, in relation to a person born after the death of his parent, be construed as a reference to the national status of the parent at the time of the parent's death.

(3) For the avoidance of doubt, it is hereby declared that a person born in Zambia before the 1st of April, 1986, whose father was an established resident shall continue to enjoy the rights and privileges, under, and shall remain subject to, the law prevailing immediately before that date.

PART III

PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOM OF THE INDIVIDUAL

Article

11. [Fundamental rights and freedoms]

It is recognised and declared that every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed, sex or marital status, but subject to the limitations contained in this Part, to each and all of the following, namely:

- (a) life, liberty, security of the person and the protection of the law;
- (b) freedom of conscience, expression, assembly, movement and association;
- (c) protection of young persons from exploitation;
- (d) protection for the privacy of his home and other property and from deprivation of property without compensation;

and the provisions of this Part shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

12. [Protection of right to life]

(1) No person shall be deprived of his life intentionally except in execution of the sentence of a court in respect of a criminal offence under the law in force in Zambia of which he has been convicted.

(2) No person shall deprive an unborn child of life by termination of pregnancy except in accordance with the conditions laid down by an Act of Parliament for that purpose.

(3) Without prejudice to any liability for a contravention of any other law with respect to the use of force in such cases; as are hereinafter mentioned, a person shall not be regarded as having been deprived of his life in contravention of this Article if he dies as a result of the use of force to such extent as is reasonably justifiable in the circumstances of the case --

(a) for the defence of any person from violence or for the defence of property;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) for the purpose of suppressing a riot, insurrection, mutiny or if he dies as a result of a lawful act of war;

(d) in order to prevent the commission by that person of a criminal offence.

13. [Protection of right to personal liberty]

(1) No person shall be deprived of his personal liberty except as may be authorised by law in any of the following cases:

(a) in execution of a sentence or order of a court, whether established for Zambia or some other country, in respect of a criminal offence or which he has been convicted;

(b) in execution of an order of a court of record punishing him for contempt of that court or of a court inferior to it;

(c) in execution of an order of a court made to secure the fulfilment of any obligation imposed on him by law;

(d) for the purpose of bringing him before a court in execution of an order of a court;

(e) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Zambia;

(f) under an order of a court or with the consent of his parent or guardian, for his education or welfare during any period ending not later than the date when he attains the age of eighteen years;

(g) for the purpose of preventing the spread of an infectious or contagious disease;

(h) in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of this care or treatment or the protection of the community;

(i) for the purpose of preventing the unlawful entry of that person into Zambia, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Zambia or for the purpose of restricting that person while he is being conveyed through Zambia in the course of his extradition or removal as a convicted prisoner from one country to another; or

(j) to such extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area within Zambia or prohibiting him from being within such area, or to such extent as may be reasonably justifiable for the taking of proceedings against that person relating to the making of any such order, or to such extent as may be reasonably justifiable for restraining that person during any visit that he is permitted to make to any part of Zambia in which, in consequence of any such order, his presence would otherwise be unlawful.

(2) any person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention.

(3) Any person who is arrested or detained --

(a) for the purpose of bringing him before a court in execution of an order of a court; or

(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Zambia;

and who is not released, shall be brought without undue delay before a court; and if any person arrested or detained under paragraph (b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

(4) Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefor from that other person.

14. [Protection from slavery and forced labour]

(1) No person shall be held in slavery or servitude.

(2) No person shall be required to perform forced labour.

(3) For the purpose of this Article, the expression "forced labour" does not include--

- (a) any labour required in consequence of a sentence or order of a court;
- (b) labour required of any person while he is lawfully detained that, though not required in consequence of a sentence or order of a court, is reasonably necessary in the interests of hygiene or for the maintenance of the place at which he is detained;
- (c) any labour required of a member of a disciplined force in pursuance of his duties as such or, in the case of a person who has conscientious objections to service as a member of a naval, military or air force, any labour that that person is required by law to perform in place of such service;
- (d) any labour required during any period when the Republic is at war or a declaration under Article 30 or 31 is in force or in the event of any other emergency or calamity that threatens the life and well-being of the community, to the extent that the requiring of such labour is reasonably justifiable in the circumstances of any situation arising or existing during that period, or as a result of that other emergency or calamity, for the purpose of dealing with that situation; or
- (e) any labour reasonably required as part of reasonable and normal communal or other civic obligation.

15. [Protection from inhuman treatment]

No person shall be subjected to torture, or to inhuman or degrading punishment or other like treatment.

16. [Protection from deprivation of property]

(1) Except as provided in this Article, no property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, unless by or under the authority of an Act of Parliament which provides for payment of adequate compensation for the property or interest or right to be taken possession of or acquired.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of clause (1) to the extent that it is shown that such law provides for the taking possession or acquisition of any property or interest therein or right thereover--

- (a) in satisfaction of any tax, rate or due;
- (b) by way of penalty for breach of any law, whether under civil process or after conviction of an offence;
- (c) in execution of judgements or orders of courts;

- (d) upon the attempted removal of the property in question out of or into Zambia in contravention of any law;
- (e) as an incident of a contract including a lease, tenancy, mortgage, charge, pledge or bill of sale or of a title deed to land;
- (f) for the purpose of its administration, care or custody on behalf of and for the benefit of the person entitled to the beneficial interest therein;
- (g) by way of the vesting of enemy property or for the purpose of the administration of such property;
- (h) for the purpose of --
 - (i) the administration of the property of a deceased person, a person of unsound mind or a person who has not attained the age of eighteen years, for the benefit of the persons entitled to the beneficial interest therein;
 - (ii) the administration of the property of a person adjudged bankrupt or a body corporate in liquidation, for the benefit of the creditors of such bankrupt or body corporate and, subject thereto, for the benefit of other persons entitled to the beneficial interest in the property;
 - (iii) the administration of the property of a person who has entered into a deed of arrangement for the benefit of his creditors; or
 - (iv) vesting any property subject to a trust in persons appointed as trustees under the instrument creating the trust or by a court or, by order of a court, for the purpose of giving effect to the trust;
- (i) in consequence of any law relating to the limitation of actions;
- (j) in terms of any law relating to abandoned, unoccupied, unutilised or undeveloped land, as defined in such law;
- (k) in terms of any law relating to absent or non-resident owners, as defined in such law, of any property;
- (l) in terms of any law relating to trusts or settlements;
- (m) by reason of the property in question being in a dangerous state or prejudicial to the health or safety of human beings, animals or plants;
- (n) as a condition in connection with the granting of permission for the utilisation of that or other property in any particular manner;
- (o) for the purpose of or in connection with the prospecting for, or exploitation of, minerals belonging to the Republic on terms which provide for the respective interests of the persons affected;

- (p) in pursuance of a provision of the marketing of property of that description in the common interests of the various persons otherwise entitled to dispose of that property;
- (q) by way of the taking of a sample for the purposes of any law;
- (r) by way of acquisition of the shares, or a class of shares, in a body corporate on terms agreed to by the holders of not less than nine-tenths in value of those shares or that class of shares;
- (s) where the property consists of an animal, upon its being found trespassing or straying;
- (t) for so long as may be necessary for the purpose of any examination, investigation, trial or inquiry or, in the case of the land, the carrying out thereon --
- (i) of work for the purpose of the conservation of natural resources or any description; or
- (ii) of agricultural development or improvement which the owner or occupier of the land has been required, and has without reasonable and lawful excuse refused or failed, to carry out;
- (u) where the property consists of any licence or permit;
- (v) where the property consists of wild animals existing in their natural habitat or the carcasses of wild animals;
- (w) where the property is held by a body corporate established by law for public purposes and in which no moneys have been invested other than moneys provided by Parliament;
- (x) where the property is any mineral, mineral oil or natural gases or any rights accruing by virtue of any title or licence for the purpose of searching for or mining any mineral, mineral oil or natural gases --
- (i) upon failure to comply with any provision of such law relating to the title or licence or to the exercise of the rights accruing or to the development or exploitation of any mineral, mineral oil or natural gases; or
- (ii) in terms of any law vesting any such property or rights in the President;
- (y) for the purpose of the administration or disposition of such property or interest or right by the President in implementation of a comprehensive land policy or of a policy designed to ensure that the statute law, the Common Law and the doctrines of equity relating to or affecting the interest in or rights over land, or any other interests or right enjoyed by Chiefs and persons claiming through and under them, shall apply with substantial uniformity throughout Zambia;
- (z) in terms of any law providing for the conversion of titles to land from freehold to leasehold and the imposition of any restriction on subdivision, assignment or sub-letting;
- (aa) in terms of any law relating to --

- (i) the forfeiture or confiscation of the property of a person who has left Zambia for the purpose or apparent purpose, of defeating the ends of justice;
 - (ii) the imposition of a fine on, and the forfeiture or confiscation of the property of, a person who admits a contravention of any law relating to the imposition or collection of any duty or tax or to the prohibition or control of dealing or transactions in gold, currencies, or securities.
- (3) An Act of Parliament such as is referred to in clause (1) shall provide that in default of agreement, the amount of compensation shall be determined by a court of competent jurisdiction.

17. [Protection for privacy of home and other property]

- (1) Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.
- (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision --
 - (a) that is reasonably required in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development and utilisation of mineral resources, or in order to secure the development or utilisation of any property for a purpose beneficial to the community;
 - (b) that is reasonably required for the purpose of protecting the rights or freedoms of other persons;
 - (c) that authorises an officer or agent of the Government, a local government authority or a body corporate established by law for a public purpose to enter on the premises or anything thereon for the purpose of any tax, rate or due or in order to carry out work connected with any property that is lawfully on those premises and that belongs to that Government, authority, or body corporate, as the case may be; or
 - (d) that authorises, for the purpose of enforcing the judgement or order of a court in any civil proceedings, the search of any person or property by order of a court or entry upon any premises by such order;

and except so far as that provision or, as the case may be, anything done under the authority thereof is shown not to be reasonably justified in a democratic society.

18. [Provisions to secure protection of law]

- (1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

(2) Every person who is charged with a criminal offence --

- (a) shall be presumed to be innocent until he is proved or has pleaded guilty;
- (b) shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence charged;
- (c) shall be given adequate time and facilities for the preparation of his defence;
- (d) shall unless legal aid is granted him in accordance with the law enacted by Parliament for such purpose be permitted to defend himself before the court in person, or at his own expense, by a legal representative of his own choice;
- (e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and
- (f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge;

and except with his own consent the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence.

(3) When a person is tried for any criminal offence, the accused person or any person authorized by him in that behalf shall, if he so requires and subject to payment of such reasonable fee as may be prescribed by law, be given within a reasonable time after judgment a copy for the use of the accused person of any record of the proceedings made by or on behalf of the court.

(4) No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time it was committed.

(5) No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence, except upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.

(6) No person shall be tried for a criminal offence if he shows that he has been pardoned for that offence.

(7) No person who is tried for a criminal offence shall be compelled to give evidence at the trial.

(8) No person shall be convicted of a criminal offence unless that offence is defined and the penalty is prescribed in a written law:

Provided that nothing in this clause shall prevent a court of record from punishing any person for contempt of itself notwithstanding that the act or omission constituting the contempt is not defined in written law and the penalty therefore is not so prescribed.

(9) Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.

(10) Except with the agreement of all the parties thereto, all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other adjudicating authority, including the announcement of the decision of the court or other authority, shall be held in public.

(11) Nothing in clause (10) shall prevent the court or other adjudicating authority from excluding from the proceedings persons other than the parties thereto and their legal representatives to such extent as the court or other authority --

(a) may consider necessary or expedient in circumstances where publicity would prejudice the interest of justice or in interlocutory proceedings; or

(b) may be empowered by law to do in the interest of defence, public safety, public order, public morality, the welfare of persons under the age of eighteen years or the protection of the private lives of persons concerned in the proceedings.

(12) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of --

(a) paragraph (a) of clause (2) to the extent that it is shown that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts;

(b) paragraph (d) of clause (2) to the extent that it is shown that the law in question prohibits legal representation before a subordinate court in proceedings for an offence under Zambian customary law, being proceedings against any person who, under that law, is subject to that law;

(c) paragraph (e) of clause (2) to the extent that it is shown that the law in question imposes reasonable conditions that must be satisfied if witnesses called to testify on behalf of an accused person are to be paid their expenses out of public funds;

(d) clause (2) to the extent that it is shown that the law provides that --

(i) where the trial of any person for any offence prescribed by or under the law has been adjourned and the accused, having pleaded to the charge, fails to appear at the time fixed by the court for the resumption of his trial after the adjournment, the proceedings may continue notwithstanding the absence of the accused if the court, being satisfied that, having regard to all the circumstances of the case, it is just and reasonable so to do, so orders; and

(ii) the court shall set aside any conviction or sentence pronounced in the absence of the accused in respect of that offence if the accused satisfies the court without undue delay that the cause of his absence was reasonable and that he had a valid defence to the charge;

(e) clause (2) to the extent that it is shown that the law provides that a trial of a body corporate may take place in the absence of any representative of the body corporate upon a charge in respect of which a plea of not guilty has been entered by the court;

(f) clause (5) to the extent that it is shown that the law in question authorises a court to try a member of a disciplined force for a criminal offence notwithstanding any trial and conviction or acquittal of that member under the disciplinary law of that force, so, however, that any court so trying such a member and convicting him shall in sentencing him to any punishment take into account any punishment awarded him under that disciplinary law.

(13) In the case of any person who is held in lawful detention, clause (1), paragraphs (d) and (e) of clause (2) and clause (3) shall not apply in relation to his trial for a criminal offence under the law regulating the discipline of persons held in detention.

(14) In its application to a body corporate clause (2) shall have effect as if the words "in person or" were omitted from paragraph (d) and (e).

(15) In this Article "criminal offence" means a criminal offence under the law in force in Zambia.

19. [Protection of freedom of conscience]

(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this Article the said freedom includes freedom of thought and religion, freedom to change his religion or belief, and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.

(2) Except with his own consent, or, if he is a minor, the consent of his guardian, no person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance if that instruction, ceremony or observance relates to a religion other than his own.

(3) No religious community or denomination shall be prevented from providing religious instruction for persons of that community or denomination in the course of any education provided by the community or denomination or from establishing and maintaining institutions to provide social services for such persons.

(4) No person shall be compelled to take any oath which is contrary to his religion or belief or to take any oath in a manner which is contrary to his religion or belief.

(5) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision which is reasonably required --

(a) in the interests of defence, public safety, public order, public morality or public health; or

(b) for the purpose of protecting the rights and freedoms of other persons, including the right to observe and practice any religion without the unsolicited intervention of members of any other religion:

and except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justified in a democratic society.

20. [Protection of freedom of expression]

(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of persons, and freedom from interference with his correspondence.

(2) Subject to the provisions of this Constitution no law shall make any provision that derogates from freedom of the press.

(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision --

(a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health; or

(b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings,

preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating educational institutions in the interests of persons receiving instruction therein, or the registration of, or regulating the technical administration or the technical operation of, newspapers and other publications, telephony, telegraphy, posts, wireless broadcasting or television; or

(c) that imposes restrictions on public officers;

and except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society.

21. [Protection of freedom of assembly and association]

(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to any political party, trade union or other association for the protection of his interests.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision --

(a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;

(b) that is reasonably required for the purpose of protecting the rights or freedoms of other persons;

(c) that imposes restrictions upon public officers; or

(d) for the registration of political parties or trade unions in a register established by or under a law and for imposing reasonable conditions relating to the procedure for entry on such register including conditions as to the minimum number of persons necessary to constitute a trade union qualified for registration;

and except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society.

22. [Protection of freedom of movement]

(1) Subject to the other provision of this Article and except in accordance with any other written law, no citizen shall be deprived of his freedom of movement, and for the purposes of this Article freedom of movement means --

(a) the right to move freely throughout Zambia;

(b) the right to reside in any part of Zambia; and

(c) the right to leave Zambia and to return to Zambia.

(2) Any restrictions on a person's freedom of movement that relates to his lawful detention shall not be held to be inconsistent with or in contravention of this Article.

(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision --

(a) for the imposition of restrictions that are reasonably required in the interests of defence, public safety, public order, public morality or public health or the imposition or restrictions on the acquisition or use by any person of land or other property in Zambia, and except so far as that provision or, the thing done under the authority thereof, as the case may be, is shown not be reasonably justifiable in a democratic society;

(b) for the imposition of restrictions on the freedom of movement of any person who is not a citizen of Zambia;

(c) for the imposition of restrictions upon the movement or residence within Zambia of public officers; or

(d) for the removal of a person from Zambia to be tried outside Zambia for a criminal offence or to undergo imprisonment in some other country in execution of the sentence of a court in respect of a criminal offence under the law in force in Zambia of which he has been convicted.

23. [Protection from discrimination on the ground of race, etc.]

(1) Subject to clauses (4), (5) and (7), no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to clauses (6), (7) and (8), no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

(3) In this Article the expression "discriminatory" mean, affording different treatment to different persons attributable, wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

(4) Clause (1) shall not apply to any law so far as that law makes provision --

(a) for the appropriation of the general revenues of the Republic;

(b) with respect to persons who are not citizens of Zambia;

(c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;

(d) for the application in the case of members of a particular race or tribe, of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons; or

(e) whereby persons of any such description as is mentioned in clause (3) may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.

(5) Nothing contained in any law shall be held to be inconsistent with or in contravention of clause (1) to the extent that it is shown that it makes reasonable provision with respect to qualifications for service as a public officer or as a member of a disciplined force or for the service of a local government authority or a body corporate established directly by any law.

(6) Clause (2) shall not apply to anything which is expressly or by necessary implication authorized to be done by any such provision or law as is referred to in clause (4) or (5).

(7) No thing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision whereby persons of any such description as is mentioned in clause (3) may be subjected to any restriction on the rights and freedoms guaranteed by Articles 17, 19, 20, 21 and 22, being such a restriction as is authorised by clause (2) of Article 17, clause (5) of Article 19, clause (2) of Article 20, clause (2) of Article 21 or clause (3) of Article 22, as the case may be.

(8) Nothing in clause (2) shall affect any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in any court that is vested in any person by or under this Constitution or any other law.

24. [Protection of young persons from exploitation]

(1) No young person shall be employed and shall and shall in no case be caused or permitted to engage in any occupation or employment which would prejudice his health or education or interfere with his physical, mental or moral development:

Provided that an Act of Parliament may provide for the employment of a young person for a wage under certain conditions.

(2) All young persons shall be protected against physical or mental ill-treatment, all forms of neglect, cruelty or exploitation.

(3) No young person shall be the subject of traffic in any form.

(4) In this Article "young person" means any person under the age of fifteen years.

25. [Derogation from fundamental rights and detention]

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of Articles 13, 16, 17, 19, 20, 21, 22, 23, or 24 to the extent that it is shown that the law in question authorises the taking, during any period when the Republic is at war or when a declaration under Article 30 is in force, or measures for the purpose of dealing with any situation existing or arising during that period; and nothing done by any person under the authority of any such law shall be held to be in contravention of any of the said provisions if it is shown that the measures taken were, having due regard to the circumstances prevailing at the time, reasonably required for the purpose of dealing with the situation in question.

26. [Provisions relating to restriction and detention]

(1) where a person's freedom of movement is restricted, or he is detained, under the authority of any such law as is referred to in Article 22 or 25, as the case may be, the following provisions shall apply –

(a) he shall, as soon as reasonably practicable and in any case not more than fourteen days after the commencement of his detention or restriction, be furnished with a statement in writing in a language that he understands specifying in detail the grounds upon which he is restricted or detained;

(b) not more than fourteen days after the commencement of his restriction or detention a notification shall be published in the *Gazette* stating that he has been restricted or detained and giving particulars of the place of detention and the provision of law under which his restriction or detention is authorised;

(c) if he so requests at any time during the period of such restriction or detention not earlier than three months after the commencement thereof or after he last made such a request during that period, as the case may be, his case shall be reviewed by an independent and impartial tribunal established by law and presided over by a person, appointed by the Chief Justice, who is or is qualified to be a judge of the High Court;

(d) he shall be afforded reasonable facilities to consult a legal representative of his own choice who shall be permitted to make representations to the authority by which the restriction or detention was ordered or to any tribunal established for the review of his case; and

(e) at the hearing of his case by such tribunal he shall be permitted to appear in person or by a legal representative of his own choice.

(2) On any review by a tribunal under this Article, the tribunal shall advise the authority by which it was ordered on the necessity or expediency of continuing his restriction or detention and that authority shall be obliged to act in accordance with any such advice.

(3) The President may at any time refer to the tribunal the case of any person who has been or is being restricted or detained pursuant to any restriction or detention order.

(4) Nothing contained in paragraph (d) or (e) of clause (1) shall be construed as entitling a person to legal representation at public expense.

(5) Parliament may make or provide for the making of rules to regulate the proceedings of any such tribunal including but without derogating from the generality of the foregoing, rules as to evidence and the admissibility thereof, the receipt of evidence including written reports in the absence of the restricted or detained person and his legal representative, and the exclusion of the public from the whole or any portion of the proceedings.

(6) Clauses (11) and (12) of Article 18 shall be read and construed subject to the provisions of this Article.

27. [Reference of certain matters to Special Tribunal]

(1) Whenever --

(a) a request is made in accordance with clause (2) for a report on a bill or statutory instrument; or

(b) the Chief Justice considers it necessary for the purpose of determining claims for legal aid in respect of proceedings under Article 30 or 31;

the Chief Justice shall appoint a tribunal which shall consist of two persons selected by him from amongst persons who hold or have held the office of a judge of the Supreme Court or the High Court.

(2) A request for a report on a bill or a statutory instrument may be made by not less than thirty members of the National Assembly by notice in writing delivered --

(a) in the case of a bill, to the Speaker within three days after the final reading of the bill in the Assembly.

(b) in the case of a statutory instrument, to the authority having power to make the instrument within fourteen days of the publication of the instrument in the *Gazette*.

(3) Where a tribunal is appointed under this Article for the purpose of reporting on a bill or a statutory instrument, the tribunal shall, within the prescribed period, submit a report to the President and to the Speaker of the National Assembly stating --

(a) in the case of a bill, whether or not in the opinion of the tribunal any, and if so which, provisions of the bill are inconsistent with this Constitution;

(b) in the case of a statutory instrument, whether or not in the opinion of the tribunal any, and if so which, provisions of the instrument are inconsistent with this Constitution; and, if the tribunal reports that any provision would be or is inconsistent with this Constitution, the grounds upon which the tribunal has reached that conclusion.

Provided that if the tribunal considers that the request for a report on a bill or statutory instrument is merely frivolous or vexatious, it may so report to the President without entering further upon the question whether the bill or statutory instrument would be or is inconsistent with this Constitution.

(4) In determining any claim for legal aid as referred to in clause (2), the tribunal may grant to any person who satisfies it that --

(a) he intends to bring or is an applicant in proceedings under clause (1) or (4) of Article 28;

(b) he has reasonable grounds for bringing the application; and

(c) he cannot afford to pay for the cost of the application;

a certificate that the application is a proper case to be determined at public expenses:

Provided that paragraph (c) shall not apply in any case where the application relates to the validity or a provision of law in respect of which the tribunal has reported that it would be or is inconsistent with this Constitution or where it appears to the tribunal that issues are or will be raised in the application which are of general importance.

(5) Where a certificate is granted to any person by the tribunal in pursuance of clause (4), there shall be paid to that person out of the general revenues of the Republic such amount as the tribunal, when hearing the application, may assess as the costs incurred by that person in connection with the application; and the sums required for making such payment shall be a charge on the general revenue of the Republic.

(6) For the purposes of clause (5) --

(a) the costs incurred in an application shall include the cost of obtaining the advice of a legal representative and, if necessary, the cost of representation by a legal representative in any court in steps preliminary or incidental to the application;

(b) in assessing the costs reasonably incurred by a person in an application regard shall be had to costs awarded against that person or recovered by him in those proceedings.

(7) In this Article, "prescribed period" means --

(a) in relation to a bill, the period commencing from the appointment of the tribunal to report upon the bill and ending thirty days thereafter or if the Speaker, on the application of the tribunal considers that owing to the length or complexity of the bill thirty days is insufficient for consideration of the bill, ending on such later day as the Speaker may determine;

(b) in relation to a statutory instrument, the period of forty days commencing with the day on which the instrument is published in the *Gazette*.

(8) Nothing in clause (1), (2) or (3) shall apply to a bill for the appropriation of the general revenues of the Republic or a bill containing only proposals for expressly altering this Constitution or the Constitution of Zambia Act, 1991.

28. [Enforcement of protective provisions]

(1) Subject to clause (5), if any person alleges that any of the provisions of Articles 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply for redress to the High Court which shall --

(a) hear and determine any such application;

(b) determine any question arising in the case of any person which is referred to it in pursuance of clause (2);

and which may, make such order, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of Articles 11 to 26 inclusive.

(2)

(a) If in any proceedings in any subordinate court any question arises as to the contravention of any of the provisions of Articles 11 to 26 inclusive, the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion the raising of the question is merely frivolous or vexatious.

(b) Any person aggrieved by any determination of the High Court under this Article may appeal there from to the Supreme Court:

Provided that no appeal shall lie from a determination of the High Court under this Article dismissing an application on the ground that it is frivolous and vexatious.

(3) No application shall be brought under clause (1) on the grounds that the provisions of Articles 11 to 26 (inclusive) are likely to be contravened by reason of proposals contained in any bill which, at the date of the application, has not become a law.

(4) Parliament may confer upon the Supreme Court or High Court such jurisdiction or powers in addition to those conferred by this Article as may appear to be necessary or desirable of the purpose of enabling that Court more effectively to exercise the jurisdiction conferred upon it by this Article or of enabling any application for redress to be more speedily determined.

29. [Declaration of war]

(1) The President may, in consultation with Cabinet, at any time, by Proclamation published in the *Gazette* declare war.

(2) A declaration made under clause (1) shall continue in force until the cessation of hostilities.

(3) An Act of Parliament shall provide for the conditions and circumstances under which a declaration may be made under clause (1).

30. [Declaration of public emergency]

(1) The President may, in consultation with Cabinet, at any time, by Proclamation published in the *Gazette* declare that a State of public emergency exists.

(2) A declaration made under clause (1) of this Article shall cease to have effect on the expiration of a period of seven days commencing with the day on which the declaration is made unless, before the expiration of such period, it has been approved by a resolution of the National Assembly supported by a majority of all the members thereof not counting the Speaker.

(3) In reckoning any period of seven days for the purposes of clause (2) no account shall be taken of any time during which Parliament is dissolved.

(4) A declaration made under clause (1) may, at any time before it has been approved by a resolution of the National Assembly, be revoked by the President by Proclamation published in the *Gazette*.

(5) Subject to clause (6) a resolution of the National Assembly under clause (2) will continue in force until the expiration of a period of three months commencing with the date of its being approved or until revoked at such earlier date of its being so approved or until such earlier date as may be specified in the resolution.

Provided that the National Assembly may, by majority of all the members thereof, not counting the Speaker extend the approval of the declaration for periods of not more than three months at a time.

(6) The National Assembly may, by resolution, at any time revoke a resolution made by it under this Article.

(7) Whenever an election to the office of President results in a change of the holder of that office, any declaration made under this Article and in force immediately before the day on which the President assumes office shall cease to have effect on the expiration of seven days commencing with that day.

(8) The expiration or revocation of any declaration or resolution made under this Article shall not affect the validity of anything previously done in reliance on such declaration.

31. [Declaration relating to threatened emergency]

(1) The President may at any time by the Proclamation published in the *Gazette* declare that a situation exists which, if it is allowed to continue may lead to a state of public emergency.

(2) A declaration made under clause (1) of this Article shall cease to have effect on the expiration of a period of seven days commencing with the day on which the declaration is made unless, before the expiration of such period, it has been approved by a resolution of the National Assembly supported by a majority of all the members thereof not counting the Speaker.

(3) In reckoning any period of seven days for the purpose of clause (2) no account shall be taken of any time during which Parliament is dissolved.

(4) A declaration made under clause (1), may, at any time before it has been approved by a resolution of the National Assembly, be revoked by the President by Proclamation published in the *Gazette*.

(5) Subject to clause (6) a resolution of the National Assembly under clause (2) shall continue in force until the expiration of a period of three months commencing with the date of its being approved or until revoked on an earlier date of its being so approved or until such earlier date as may be specified in the resolution.

(6) The National Assembly may by resolution, at any time revoke a resolution made by it under this Article.

(7) Whenever an election to the office of President results in a change in the holder of that office, any declaration made under this Article and in force immediately before the day on which the President assumes office, shall cease to have effect on the expiration of seven days commencing with that day.

(8) The expiration or revocation of any declaration or resolution made under this Article shall not affect the validity of anything previously done in reliance on such declaration.

32. [Interpretation and Savings]

(1) In this Part, unless the context otherwise requires --

"contravention", in relation to any requirement, includes a failure to comply with that requirement and cognate expressions shall be construed accordingly;

"court" means any court of law having jurisdiction in Zambia, other than a court established by a disciplinary law, and in Articles 12 and 14 includes a court established by a disciplinary law;

"disciplinary law" means a law regulating the disciplined force;

"disciplined force" means --

- (a) a naval, military or air force;
- (b) the Zambia Police Force; or
- (c) any other force established by or under an Act of Parliament;

"legal representative" means a person entitled to practise in Zambia as an advocate;

"member", in relation to a disciplined force, includes any person who, under the law regulating the discipline of that force is subject to that discipline.

(2) In relation to any person who is a member of a disciplined force raised under the law of Zambia, nothing contained in or done under the authority of the disciplinary law of that force shall be held to be inconsistent with or in contravention of any of the provisions of this Part other than Articles 12, 14, and 15.

(3) In relation to any person who is a member of a disciplinary force raised otherwise than as aforesaid and lawfully present in Zambia, nothing contained in or done under the authority of the disciplinary law of that force shall be held to be inconsistent with or in contravention of any of the provisions of this Article

PART IV

THE EXECUTIVE

(As amended by Act No. 18 of 1996)

Article

33. [The office of President]

(1) There shall be a President of the Republic of Zambia who shall be the Head of State and of the Government and the Commander-in-Chief of the Defence Force.

(2) The executive power of the Republic of Zambia shall vest in the President and, subject to the other provisions of this Constitution, shall be exercised by him either directly or through officers subordinate to him.

34. [Election of President]

(1) The election of the President shall be direct by universal adult suffrage and by secret ballot and shall be conducted in accordance with this Article and as may be prescribed by or under an Act of Parliament.

(2) An election to the office of President shall be held whenever the National Assembly is dissolved and otherwise as provided by Article 38.

(3) A person shall be qualified to be a candidate for election as President if --

- (a) he is a citizen of Zambia;
- (b) both his parents are Zambians by birth or descent;

- (c) he has attained the age of thirty-five years;
 - (d) he is a member of, or is sponsored by, a political party;
 - (e) he is qualified to be elected as a member of the National Assembly; and
 - (f) he has been domiciled in Zambia for a period of at least twenty years.
- (4) A candidate for election as President (hereinafter referred to as a Presidential candidate) shall deliver his nomination papers to the returning officer in such manner, on such day, at such time and at such place as may be prescribed by or under an Act of Parliament.
- (5) A Presidential candidate shall not be entitled to take part in an election unless --
- (a) he has paid such election fee as may be prescribed by or under an Act of Parliament on or before the date fixed by the Electoral Commission in that behalf;
 - (b) he makes, a statutory declaration, of his assets and liabilities, which shall be open to public inspection at such time and at such place as may be prescribed by or under an Act of Parliament; and
 - (c) his nomination is supported by not less than 200 registered voters.
- (6) At an election to the office of President --
- (a) all persons registered in Zambia as voters for the purposes of elections to the National Assembly shall be entitled to vote in the election;
 - (b) the poll shall be taken by a secret ballot on such day, at such time, in such places and in such manner as may be prescribed by or under an Act of Parliament;
 - (c) after the expiration of the time fixed for polling, the votes cast shall be counted and the returning officer shall declare the result.
- (7) Where there is only one qualified Presidential candidate nominated for election, that candidate shall be declared as elected without an election taking place.
- (8) The Returning Officer shall declare the candidate who receives the highest numbers of the total votes cast to have been duly elected as President.
- (9) A person elected as President under this Article shall be sworn in and assume office immediately but not later than twenty-four hours from the time of declaring the election.
- (10) The person who has held office of President shall immediately hand over the office of President to the person elected as President and shall complete the procedural and administrative handing over process within fourteen days from the date the person elected as President is sworn in.
- (11) The person who has held office as President shall not, within the period referred to in clause (10), perform any functions of the office of President under this Constitution or any other law.

35. [Tenure of office of President]

- (1) Subject to clause (2) and (4) every President shall hold office for a period of five years.
- (2) Notwithstanding anything to the contrary contained in this Constitution or any other Law no person who has twice been elected as President shall be eligible for re-election to that office.
- (3) The President may, at any time by writing under his hand addressed to the Speaker of the National Assembly, resign his office.
- (4) A person assuming the office of the President in accordance with this Constitution shall, unless --
 - (a) he resigns his office;
 - (b) he ceases to hold office by virtue of Article 36 or 37; or
 - (c) the National Assembly is dissolved;continue in office until the person elected at the next election to the office of President assumes office.

36. [Removal of President on grounds of incapacity]

- (1) If it is resolved by a majority of all the members of the Cabinet that the question of the physical or mental capacity of the President to discharge the functions of his office ought to be investigated, and they so inform the Chief Justice, then the Chief Justice shall appoint a board consisting of not less than three persons selected by him from among persons who are qualified as medical practitioners under the law of Zambia or under the law of any other country in the Commonwealth, and the board shall inquire into the matter and report to the Chief Justice on whether or not the President is, by reason of any infirmity of body or mind, incapable of discharging the functions of his office.
- (2) If the board reports that the President is incapable of discharging the functions of his office, the Chief Justice shall certify in writing accordingly and shall table such certificate, with the report of the board before the National Assembly who shall on a motion, passed by a two thirds majority --
 - (a) ratify the decision of the board, and thereupon the President shall cease to hold office; or
 - (b) reject the decision of the board and cause a further inquiry into whether or not the President is incapable of discharging the functions of his office and shall thereafter decide on such questions by a two-thirds majority vote, which decision shall be final.
- (3) Where the Cabinet resolve that the question of the physical or mental capacity of the President to discharge the functions of his office shall be investigated, the President shall, until another person assumes the office of President or the Board appointed under clause (1)

reports that the President is not incapable of discharging the functions of his office, whichever is earlier, cease to perform the functions of his office and those functions shall be performed by --

(a) the Vice-President; or

(b) in the absence of the Vice-President or if the Vice-President is unable, by reason of physical or mental infirmity, to discharge the functions of his office, by such member of the Cabinet as the Cabinet shall elect:

Provided that any person performing the functions of the office of President under this clause shall not dissolve the National Assembly nor, except on the advice of the Cabinet, revoke any appointment made by the President.

(4) A motion for the purposes of clause (1) may be proposed at any meeting of the Cabinet.

37. [Impeachment of President for violation of Constitution]

(1) If notice in writing is given to the Speaker of the National Assembly signed by not less than one-third of all the members of the Assembly of a motion alleging that the President has committed any violation of the Constitution or any gross misconduct and specifying the particulars of the allegations and proposing that a tribunal be established under this Article to investigate those allegations, the Speaker shall --

(a) if Parliament is then sitting or has been summoned to meet within five days, cause the motion to be considered by the National Assembly within seven days of the notice;

(b) if Parliament is not then sitting (and notwithstanding that it may be prorogued) summon the National Assembly to meet within twenty-one days of the notice and cause the motion to be considered at that meeting.

(2) Where a motion under this Article is proposed for consideration by the National Assembly, the National Assembly shall debate the motion and if the motion is supported by the votes of not less than two thirds of all the members of the National Assembly, the motion shall be passed.

(3) If the motion is declared to be passed under clause (2) --

(a) the Chief Justice shall appoint a tribunal which shall consist of a Chairman and not less than two other members selected by the Chief Justice from among persons who hold or have held high judicial office;

(b) the tribunal shall investigate the matter and shall report to the National Assembly whether it finds the particulars of the allegations specified in the motion to have been substantiated; and

(c) the President shall have the right to appear and be represented before the tribunal during its investigation of the allegations against him.

(4) If the tribunal reports to the National Assembly that the tribunal finds that the particulars of any allegation against the President specified in the motion have not been substantiated no further proceedings shall be taken under this Article in respect of that allegation.

(5) If the tribunal reports to the National Assembly that the tribunal finds that the particulars of any allegation specified in the motion have been substantiated, the National Assembly may, on a motion supported by the votes of not less than three quarters of all members of the National Assembly, resolve that the President has been guilty of such violation of the Constitution or, as the case may be, such gross misconduct as is incompatible with his continuance in office as President and, if the National Assembly so resolves, the President shall cease to hold office upon the third day following the passage of the resolution.

(6) No proceedings shall be taken or continued under this Article at any time when Parliament is dissolved.

38. [Vacancy in office of President]

(1) If the office of the President becomes vacant by reason of his death or resignation or by reason of his ceasing to hold office by virtue of Article 36, 37, or 88, an election to the office of President shall be held in accordance with Article 34 within ninety days from the date of the office becoming vacant.

(2) Whenever the office of President becomes vacant, the Vice-President or, in the absence of the Vice-President or if the Vice-President is unable, by reason of physical or mental infirmity, to discharge the functions of his office, a member of the Cabinet elected by the Cabinet shall perform the functions of the office of President until a person elected as President in accordance with Article 34 assumes office.

(3) The Vice-President or, the member of the Cabinet as the case may be, performing the functions of the office of the President under clause (2) shall not dissolve the National Assembly nor, except on the advice of the Cabinet, revoke any appointment made by the President.

39. [Discharge of functions of President during absence, illness, etc.]

(1) Whenever the President is absent from Zambia or considers it desirable so to do by reason of illness or for any other cause, he may by direction in writing, authorise the Vice-President, or where the Vice-President is absent from Zambia or incapable of discharging the functions of the office of President, any other person, to discharge such functions of the office of

President as he may specify, and the Vice-President or such other person may discharge those functions until his authority is revoked by the President.

(2) If the President is incapable by reason of physical or mental infirmity of discharging the functions of his office and the infirmity is of such a nature that the President is unable to authorize another person under this Article to perform those functions --

(a) the Vice-President; or

(b) during any period when the Vice-President is absent from Zambia or is himself, by reason of physical or mental infirmity, unable to perform the functions of his office, such member of the Cabinet as the Cabinet shall elect;

shall perform the functions of the office of President:

Provided that any person performing the functions of the office of President under this clause shall not dissolve the National Assembly nor, except on the advice of the Cabinet, revoke any appointment made by the President.

(3) Any person performing the functions of the office of President by virtue of clause (2) shall cease to perform those functions if he is notified by the Speaker that the President is about to resume those functions or if another person is elected as, and assumes the office of, President.

(4) For the purpose of clause (2), a certificate of the Chief Justice that --

(a) the President is incapable by reason of physical or mental infirmity of discharging the functions of his office and that the infirmity is of such a nature that the President is unable to authorise another person under this Article to perform those functions; or

(b) the Vice-President is by reason of physical or mental infirmity unable to discharge the functions of his office:

shall be of no effect until such certificate is verified by the National Assembly:

Provided that any such certificate as is referred to in paragraph (a) shall cease to have effect if the President notifies any person under clause (3) that he is about to resume the functions of the office of the President or if another person is elected as, and assumes the office of, President.

40. [Oath of President]

A person assuming the office of President shall, before entering the office, take and subscribe to such oaths as may be prescribed by or under an Act of Parliament.

41. [Returning Officer; questions relating to elections]

(1) The Chief Justice shall be the Returning Officer for the purpose of elections to the office of President.

(2) Any question which may arise as to whether --

(a) any provisions of this Constitution or any law relating to the election of a President has been complied with;

(b) any person has been validly elected as President under Article 34;

shall be referred to and determined by the full bench of the Supreme Court.

42. [Salary and allowances of President]

(1) The President shall receive such salary and allowances as may be prescribed by an Act of Parliament; and they shall be a charge on the general revenues of the Republic.

(2) The salary and allowances of the President shall not be altered to his disadvantage during his term of office.

(3) A person who has held the office of President shall receive such pension and such gratuity as may be prescribed by an Act of Parliament, and that pension and gratuity shall be a charge on the general revenues of the Republic.

43. [Protection of President in respect of legal proceedings]

(1) No civil proceedings shall be instituted or continued against the person holding the office of President or performing the functions of that office in respect of which relief is claimed against him in respect of which relief is claimed against him in respect of anything done or omitted to be done in his private capacity.

(2) A person holding the office of President or performing the functions of that office shall not be charged with any criminal offence or be amenable to the criminal jurisdiction of any court in respect of any act done or omitted to be done during his tenure of that office or, as the case may be, during his performance of the functions of that office.

(3) A person who has held, but no longer holds, the office of President shall not be charged with a criminal offence or be amenable to the criminal jurisdiction of any court, in respect of any act done or omitted to be done by him in his personal capacity while he held office of President, unless the National Assembly has, by resolution, determined that such proceedings would not be contrary to the interests of the State.

(4) Where provision is made by law limiting the time within which proceedings of any description may be brought against any person, the term of any person in the office of President shall not be taken into account in calculating any period of time prescribed by that law which determines whether any such proceedings as are mentioned in clause (1) and (3) may be brought against that person.

44. [Functions of President]

(1) As the Head of the State, the President shall perform with dignity and leadership all acts necessary or expedient for, or reasonably incidental to, the discharge of the executive functions of government subject to the overriding terms of this Constitution and the Laws of Zambia which he is constitutionally obliged to protect, administer and execute.

(2) Without prejudice to the generality of clause (1), the President may preside over meetings of the Cabinet and shall have the power, subject to this Constitution to --

(a) dissolve the National Assembly as provided in Article 88;

(b) accredit, receive and recognise ambassadors, and to appoint ambassadors, plenipotentiaries, diplomatic representatives and consuls;

(c) pardon or reprieve offenders, either unconditionally or subject to such conditions as he may consider fit;

(d) negotiate and sign international agreements and to delegate the power to do so;

(e) establish and dissolve such Government Ministries and Departments subject to the approval of the National Assembly;

(f) confer such honours as he considers appropriate on citizens, residents and friends of Zambia in consultation with interested and relevant persons and institutions; and

(g) appoint such persons as are required by this Constitution or any other law to be appointed by him.

(3) Subject to the provisions of this Constitution dealing with assent to laws passed by Parliament and the promulgation and publication of such laws in the *Gazette*, the President shall have power to --

(a) sign and promulgate any proclamation which by law he is entitled to proclaim as President; and

(b) initiate, in so far as he considers it necessary and expedient, laws for submission and consideration by the National Assembly.

(4) When any appointment to an office to be made by the President is expressed by any provision of this Constitution to be subject to ratification by the National Assembly --

(a) the National Assembly shall not unreasonably refuse or delay such ratification but the question whether the Assembly has so acted unreasonably shall not be enquired into by any court;

(b) if such ratification is refused the President may appoint another person to the office in question and shall submit the appointment for ratification; or

(c) if the National Assembly refused to ratify the second appointment it shall be invited to ratify an appointment for the third time but the third appointment shall take effect irrespective of whether such ratification is refused, or is delayed for a period of more than fourteen days.

(5) Subject to the other provisions of this Constitution and any other law, any person appointed by the President under this Constitution or that other law may be removed by the President.

(6) In the exercise of any functions conferred upon him under this Article, the President shall, unless he otherwise obliges, act in his own deliberate judgment and shall not be obliged to follow the advice tendered by any other person or authority.

(7) Nothing in this Article shall prevent Parliament from conferring functions on persons or authorities other than the President.

45. [Vice-President]

(1) There shall be an office of Vice-President of the Republic.

(2) The Vice-President shall be appointed by the President from among the members of the National Assembly.

(3) Subject to the provisions of this Constitution the Vice-President shall vacate that office upon the assumption by any person of the office of President.

(4) In addition to the powers and functions of the Vice-President specified in this Constitution or under any other law, the Vice-President shall perform such functions as shall be assigned to him by the President.

(5) The salary and allowances of the Vice-President shall be such as may be prescribed by an Act of Parliament, and shall be a charge on the general revenues of the Republic.

46. [Ministers]

(1) There shall be such Ministers as may be appointed by the President.

(2) Appointment to the office of Minister shall be made from among the members of the National Assembly.

(3) A Minister shall be responsible, under the directions of the President, for such business of the Government including the administration of any Ministry or Department of Government as the President may assign to such Minister.

(4) The salaries and allowances of a Minister shall be such as may be prescribed by an Act of Parliament, and shall be a charge on the general revenues of the Republic.

47. [Deputy Ministers]

(1) The President may appoint such Deputy Ministers as he may consider necessary to assist Ministers in the performance of their functions and to exercise or perform on behalf of Ministers such of the Ministers' functions as the President may authorise in that behalf.

(2) A Provincial Deputy Minister shall be responsible for the administration of any province as the President may assign to such Provincial Deputy Minister.

(3) Appointment to the office of Provincial Deputy Minister and Deputy Minister shall be made from amongst members of the National Assembly.

(4) The salaries and allowances of Provincial Deputy Minister and Deputy Ministers shall be such as may be prescribed by an Act of Parliament, and shall be a charge on the general revenues of the Republic.

48. [Oath of Vice-President, Minister and Deputy Ministers]

A Vice-President, Minister or Deputy Ministers shall not enter upon the duties of his office unless he has taken and subscribed the oath of allegiance and such oath for the due execution of his office as may be prescribed by or under an Act of Parliament.

49. [Cabinet]

(1) There shall be a Cabinet which shall consist of the President, the Vice-President and the Ministers.

(2) There shall preside at meetings of the Cabinet --

(a) the President; or

(b) in the absence of the President, the Vice-President.

(3) The Cabinet may act notwithstanding any vacancy in its membership.

50. [Functions of Cabinet]

The Cabinet shall formulate the policy of the Government and shall be responsible for advising the President with respect to the policy of the Government and with respect to such other matters as may be referred to it by the President.

51. [Accountability of Cabinet]

The Cabinet and Deputy Ministers shall be accountable collectively to the National Assembly.

52. [Code of Conduct]

All ministers and Deputy Ministers shall conduct themselves, during their tenure of office, in accordance with a code of conduct promulgated by Parliament.

53. [Secretary to Cabinet]

(1) There shall be a Secretary to the Cabinet whose office shall be a public office and who shall, subject to ratification by the National Assembly, be appointed by the President.

(2) The Secretary to the Cabinet shall --

(a) be the Head of the Public Service and shall be responsible to the President for securing the general efficiency of the public service;

(b) have charge of the Cabinet Office and be responsible in accordance with the instructions given to him by the President, for arranging the business for, and keeping the minutes of the Cabinet and for conveying decisions made in Cabinet to the appropriate authorities; and

(c) have such other functions as may be prescribed by or under an Act of Parliament or as the President may direct.

54. [Attorney-General]

(1) There shall be an Attorney-General of the Republic who shall, subject to ratification by the National Assembly, be appointed by the President and shall be --

(a) an ex-officio member of the Cabinet; and

(b) the principal legal adviser to the Government.

(2) Without prejudice to the general functions under clause (1), the functions of the Attorney-General shall be to --

(a) cause the drafting of, and sign, all Government Bills to be presented to Parliament;

(b) draw and peruse agreements, contracts, treaties, conventions and documents, by whatever name called, to which the Government is a party or in respect of which the Government has an interest;

(c) represent the Government in courts or any other legal proceedings to which Government is a party; and

(d) perform such other functions as may be assigned to him by the President or by law.

(3) Subject to the other provisions of this Constitution, no agreement, contract, treaty, convention or document by whatever named called, to which Government is a party or in respect of which the Government has an interest, shall be concluded without the legal advice of the Attorney-General, except in such cases and subject to such conditions as Parliament may by law prescribe.

(4) A person shall not be qualified to be appointed to the office of Attorney-General unless he is qualified for appointment as Judge of the High Court.

(5) The office of the Attorney-General shall become vacant if the holder of the office is removed from office by the President.

(6) The person holding the office of Attorney-General may resign upon giving three months notice to the President.

(7) In the exercise of the power to give directions to the Director of Public Prosecutions conferred by clause (7) of Article 56, the Attorney-General shall not be subject to the direction or control of any other person or authority.

55. [Solicitor-General]

(1) There shall be a Solicitor-General of the Republic whose office shall be a public office and who shall, subject, to ratification by the National Assembly, be appointed by the President.

(2) A person shall not be qualified to be appointed to the office of Solicitor-General unless he is qualified for appointment as a Judge of the High Court.

(3) The office of Solicitor-General shall become vacant if the holder of the office is removed from office by the President.

(4) The person holding the office of Solicitor-General may resign upon giving three months notice to the President.

(5) Any power or duty imposed on the Attorney-General by this Constitution or any other written law may be exercised or performed by the Solicitor General --

(a) whenever the Attorney-General is unable to act owing to illness or absence; and

(b) in any case where the Attorney-General has authorised the Solicitor-General to do so.

56. [Director of Public Prosecutions]

(1) There shall be a Director of Public Prosecutions and who shall, subject to ratification by the National Assembly, be appointed by the President.

(2) A person shall not be qualified to be appointed to the office of Director of Public Prosecutions unless he is qualified for appointment as Judge of the High Court with experience biased towards criminal law.

(3) The Director of Public Prosecutions shall have power in any case which he considers it desirable so to do --

(a) to institute and undertake criminal proceedings against any person before any court, other than a court martial, in respect of any offence alleged to have been committed by that person;

(b) to take over and continue any such criminal proceedings as have been instituted or undertaken by any other person or authority; and

(c) to discontinue, at any stage before judgement is delivered, any such criminal proceedings instituted or undertaken by himself or any other person or authority.

(4) The powers of the Director of Public Prosecutions under clause (3) may be exercised by him in person or by such public officer or class of public officers as may be specified by him, acting in accordance with his general or special instructions:

Provided that nothing in this clause shall preclude the representation of the Director of Public Prosecutions before any court by a legal practitioner.

(5) The powers conferred on the Director of Public Prosecutions by paragraphs (b) and (c) of clause (3) shall be vested in him to the exclusion of any other person or authority.

(6) For the purposes of this Article, any appeal from any judgement in any criminal proceedings before any court, or any case stated or question of law reserved for the purposes of any such proceedings, to any other court in Zambia shall be deemed to be part of those proceedings:

Provided that the power conferred on the Director of Public Prosecutions by paragraph (c) of clause (3) shall not be exercised in relation to any appeal by a person convicted in any criminal proceedings or to any case stated or question of law reserved at the instance of such person.

(7) In the exercise of the powers conferred on him by this Article, the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority:

Provided that where the exercise of any such power in any case may, in the judgement of the Director of Public Prosecutions, involve general considerations of public policy, the Director of Public Prosecutions shall bring the case to the notice of the Attorney-General and shall in the exercise of his powers in relation to that case, act in accordance with any directions of the Attorney-General.

57. [Discharge of functions of Director of Public Prosecutions during absence, illness, etc.]

Whenever the Director of Public Prosecutions is absent from Zambia or the President considers it desirable so to do by reason of the illness of the Director of Public Prosecutions or for any other cause, he may on the advice of the Judicial Service Commission appoint any person to discharge the functions of the Director of Public Prosecutions until such appointment is revoked.

58. [Tenure of office of Director of Public Prosecutions]

(1) Subject to the provisions of this Article, a person holding the office of Director of Public Prosecutions shall vacate his office when he attains the age of sixty years.

(2) A person holding the office of Director of Public Prosecutions may be removed from office only for incompetence or inability to perform the functions of his office whether arising from infirmity of body or mind or misbehaviour and shall not be so removed except in accordance with the provisions of this Article.

(3) If the President considers that the question of removing a person holding the office of Director of Public Prosecution from office ought to be investigated, then --

- (a) he shall appoint a tribunal which shall consist of a Chairman and not less than two other members, who hold or have held high judicial office;
- (b) the tribunal shall inquire into the matter and report on the facts thereof to the President and advise the President whether the person holding the office of Director of Public Prosecutions ought to be removed from office under this Article for incompetence or inability or for misbehavior.
- (4) Where a tribunal appointed under clause (3) advises the President that a person holding the office of Director of Public Prosecutions ought to be removed from office for incompetence or inability or for misbehaviour, the President shall remove such person from office.
- (5) If the question of removing a person holding the office of Director of Public Prosecutions from office has been referred to a tribunal under this Article, the President may suspend that person from performing the functions of his office, and any such suspension may at any time be revoked by the President and shall in any case cease to have effect if the tribunal advises the President that the person ought not to be removed from office.

59. [Prerogative of mercy]

The President may --

- (a) grant to any person convicted of any offence a pardon, either free or subject to lawful conditions;
- (b) grant to any person a respite, either indefinite or for a specified period, of the execution of any punishment imposed on that person for any offence;
- (c) substitute a less severe form of punishment for any punishment imposed on any person for any offence; and
- (d) remit the whole or part of any punishment imposed on any person for any offence or any penalty or forfeiture or confiscation otherwise due to the Government on account of any offence.

60. [Advisory committee]

- (1) There shall be an advisory committee on the prerogative of mercy which shall consist of such persons as may be appointed by the President.
- (2) The President may appoint different persons to the advisory committee for the purposes of advising him in relation to persons convicted by courts-martial and for purposes of advising him in relation to persons convicted by other courts.
- (3) A member of the advisory committee shall hold office at the pleasure of the President.

(4) Where any person has been sentenced to death for any offence the President shall cause the question of the exercise in relation to that person of the powers conferred by Article 59 to be considered at a meeting of the advisory committee.

(5) Subject to the provisions of clause (4), the President may refer to the advisory committee any questions as to the exercise of the powers conferred upon him by Article 59.

(6) The President, if present, shall preside at any meeting of the advisory committee.

(7) The President may determine the procedure of the advisory committee.

61. [Offices for Republic]

(1) Subject to the other provisions of this Constitution and any other law, the power to constitute offices for the Republic and the power to abolish any such office shall vest in the President.

(2) Subject to the other provisions of this Constitution and any other law, the power to appoint persons to hold or act in offices constituted for the Republic of Zambia, to confirm appointments, to exercise disciplinary control over persons holding or acting in such offices and to remove any such person from office shall vest in the President.

PART V

THE LEGISLATURE

Article

62. [Legislative power and membership of Parliament]

The legislative power of the Republic of Zambia shall vest in Parliament which shall consist of the President and the National Assembly.

(As amended by Act No. 18 of 1996)

63. [Composition of, and election to, National Assembly]

(1) The National Assembly shall consist of --

(a) one hundred and fifty elected members;

(b) not more than eight nominated members; and

(c) the Speaker of the National Assembly.

(2) Subject to the provisions of this Constitution, the election of members of the National Assembly shall be direct, by universal adult suffrage and by secret ballot and shall be conducted in accordance with the provisions of this Constitution and as may be prescribed by or under an Act of Parliament.

(As amended by Act No. 18 of 1996)

64. [Qualification for election to National Assembly]

Subject to Article 65, a person shall be qualified to be elected as a member of the National Assembly if --

- (a) he is a citizen of Zambia;
- (b) he has attained the age of twenty-one years; and
- (c) he is literate and conversant with the official language of Zambia.

(As amended by Act No. 18 of 1996)

65. [Disqualification for election to National Assembly]

(1) No person shall not be qualified to be elected as a member of the National Assembly if --

- (a) that person is under a declaration of allegiance to some country other than Zambia;
- (b) that person is under any law in force in Zambia, adjudged or otherwise declared to be of unsound mind;
- (c) that person is under a sentence of death imposed on him by a court in Zambia or a sentence of imprisonment, by whatever name called, imposed on him by such a court or substituted by a competent authority for some other sentence imposed on him by such court;
- (d) that person is an undischarged bankrupt, having been adjudged or otherwise declared bankrupt under any law in force in Zambia;
- (e) that person's freedom of movement is restricted, or that person is detained under the authority of law; or
- (f) that person, within a period of five years before his nomination for election, has served a sentence of imprisonment for a criminal offence

(2) A person who holds, or is a validly nominated candidate in an election for, the office of the President shall not be qualified for election as a member of the National Assembly.

(3) A Chief shall not be qualified for election as a member of the National Assembly.

(4) A Chief who intends to stand for elections to the National Assembly shall abdicate his chieftaincy before lodging his nomination.

(5) Parliament may provide that a person who holds or is acting in any office that is specified by Parliament and the functions of which involve responsibility for, or in connection with, the conduct of any election to the National Assembly or the compilation of any register of voters for the purposes of such an election shall not be qualified to be elected as a member of the National Assembly.

(6) Parliament may provide that a person who is convicted by any court of any offence that is prescribed by Parliament and that is connected with election of the members of the National Assembly or who is reported guilty of such offence by the court trying an election petition shall not be qualified to be elected as a member of the National Assembly for such period, not

exceeding five years following his conviction or the report of the court, as the case may be, as may be so prescribed.

(7) A person holding or acting in any post, office or appointment --

(a) in the Zambia Defence Force as defined in the Defence Act, the Combined Cadet Force, the Zambia National Service, or any other force or service established for the preservation of security in Zambia;

(b) in the Zambia Police Force, the Zambia Police Reserve, the Zambia Security Intelligence Service, the Anti-Corruption Commission, the Drug Enforcement Commission, the Zambia Prison Service or in any other force or service established for the preservation of security in Zambia;

(c) in the Public Service including an office to which Article 61 applies;

(d) in the Teaching Service; or

(e) in any statutory body or any company or institution in which the Government has any interest; or

(f) prescribed in that behalf or under an Act of Parliament;

shall not be qualified for election as a member of the National Assembly.

(6) In this Article, the reference to a sentence of imprisonment shall be construed as not including a sentence of imprisonment the execution of which is suspended or a sentence of imprisonment in default of payment of a fine.

(As amended by Act No. 18 of 1996)

66. [Nomination for election to National Assembly]

(1) Nominations for election to the National Assembly shall be delivered to the Returning Officer appointed by the Electoral Commission on such day and at such time and at such place as may be prescribed by the Electoral Commission.

(2) Any nomination for election to the National Assembly shall not be valid unless --

(a) the candidate has paid the election fee prescribed by or under an Act of Parliament; and

(b) the nomination is supported by not less than nine persons registered in the constituency in which the candidate is standing for the purpose of elections to the National Assembly.

(As amended by Act No. 18 of 1996)

67. [By-elections for the National Assembly]

(1) When a vacancy occurs in the seat of a member of the National Assembly as a result of the death or resignation of the member or by virtue of Article 71, a by-election shall be held within ninety days after the occurrence of the vacancy.

(2) Parliament may by an Act of Parliament prescribe the manner in which a by-election shall be held.

(As amended by Act No. 18 of 1996)

68. [Nominated members]

(1) The President may, at any time after a general election to the National Assembly and before the National Assembly is next dissolved, appoint such number of persons as he considers necessary to enhance the representation of the National Assembly as regards special interests or skills, to be nominated members of the National Assembly, so, however, that there are not more than eight such members as any one time.

(2) Subject to the provisions of this Article, a person may be appointed as a nominated member if he is qualified under Article 64 and is not disqualified under Article 65 for election as an elected member.

(3) A person may not be appointed as a nominated member if he was a candidate for election in the last preceding general election or in any subsequent by-election.

(As amended by Act No. 18 of 1996)

69. [Speaker]

(1) There shall be a Speaker of the National Assembly who shall be elected by the members of the Assembly from among persons who are qualified to be elected as members of the Assembly but are not members of the Assembly.

(2) The Speaker shall vacate his office --

(a) if any circumstances arise that, if he were not Speaker, would disqualify him for election as such;

(b) when the National Assembly first sits after any dissolution of the National Assembly; or

(c) if the National Assembly resolves, upon a motion supported by the votes of not less than two-thirds of all the members thereof, that he shall be removed from office.

(3) No business shall be transacted in the National Assembly, other than an election to the office of Speaker, at any time when the office of Speaker is vacant.

(As amended by Act No. 18 of 1996)

70. [Deputy Speaker]

(1) There shall be a Deputy Speaker of the National Assembly who shall be elected by the members of the Assembly from among members of the Assembly.

(2) The members of the National Assembly shall elect a person to the office of Deputy Speaker when the Assembly first sits after any dissolution of the National Assembly and, if

the office becomes vacant otherwise than by reason of the dissolution of the National Assembly, at the first sitting of the Assembly after the office becomes vacant.

(3) The Deputy Speaker shall vacate his office --

- (a) if he ceases to be a member of the National Assembly;
- (b) if he assumes the office of President or becomes the Vice-President, a Minister, a Deputy Minister or holds or acts in any office prescribed in that behalf by or under an Act of Parliament; or
- (c) if the National Assembly resolves that he should be removed from office.

(As amended by Act No. 18 of 1996)

71. [Tenure of office of members of National Assembly]

(1) Every member of the National Assembly, with the exception of the Speaker, shall vacate his seat in the Assembly upon the dissolution of the National Assembly.

(2) A member of the National Assembly shall vacate his seat in the Assembly --

- (a) if he ceases to be a citizen of Zambia;
- (b) if he acts contrary to the code of conduct prescribed by an Act of Parliament;
- (c) in the case of an elected member, if he becomes a member of a political party other than the party, of which he was an authorised candidate when he was elected to the National Assembly or, if having been an independent candidate, he joins a political party or having been a member of a political, he becomes an independent;
- (d) if he assumes the office of President;
- (e) if he is sentenced by a court in Zambia to death or to imprisonment, by whatever name called, for a term exceeding six months;
- (f) if any circumstances arise that, if he were not a member of the Assembly, would cause him to be disqualified for election as such under Article 65;
- (g) if, under the authority of any such law as is referred to in Article 22 or 25 --
- (i) his freedom of movement has been restricted or he has been detained for a continuous period exceeding six months;
- (ii) his freedom of movement has been restricted and he has immediately thereafter been detained and the total period of restriction and detention together exceeds six months; or
- (iii) he has been detained and immediately thereafter his freedom of movement has been restricted and the total period of detention and restriction together exceeds six months.

(3) Notwithstanding anything contained in clause (2), where any member of the National Assembly who has been sentenced to death or imprisonment, adjudged or declared to be of unsound mind, adjudged or declared bankrupt or convicted or reported guilty of any offence

prescribed under clause (4) of Article 65 appeals against the decision or applied for a free pardon in accordance with any law, the decision shall not have effect for the purpose of this Article until the final determination of such appeal or application:

Provided that --

- (i) such member shall not, pending such final determination, exercise his functions or receive any remuneration as a member of the National Assembly; and
- (ii) if, on the final determination of the member's appeal or application, his conviction is set aside, or he is granted a free pardon, or he is declared not to be of unsound mind or bankrupt or guilty of an offence prescribed under clause (4) of Article 65, he shall be entitled to resume his functions as a member of the National Assembly unless he has previously resigned, and to receive remuneration as a member for the period during which he did not exercise his functions by reason of the provisions of paragraph (i) of this proviso.

(As amended by Act No. 18 of 1996)

72. [Determination of questions as to membership of National Assembly]

(1) The High Court shall have power to hear and determine any question whether --

- (a) any person has been validly elected or nominated as a member of the National Assembly or the seat of any member has become vacant;
- (b) any person has been validly elected as Speaker or Deputy Speaker of the National Assembly or, having been so elected, has vacated the office of Speaker or Deputy Speaker.

(2) An appeal from the determination of the High Court under this Article shall lie to the Supreme Court:

Provided that an appeal shall lie to the Supreme Court from any determination of the High Court on any question of law including the interpretation of this Constitution.

(As amended by Act No. 18 of 1996)

73. [Clerk and Staff of National Assembly]

There shall be a Clerk of the National Assembly and such other offices in the department of the Clerk of the National Assembly as may be prescribed by an Act of Parliament.

(As amended by Act No. 18 of 1996)

74. [Removal of nominated member by President]

The President may, at any time, terminate the appointment of any nominated member appointed under Article 68 and appoint any other person in that member's stead.

(As amended by Act No. 18 of 1996)

75. [The franchise]

(1) Every citizen of Zambia who has attained the age of eighteen years shall, unless he is disqualified by Parliament from registration as a voter for the purposes of elections to the National Assembly, be entitled to be registered as such a voter under a law in that behalf, and no other person may be so registered.

(2) Every person who is registered in any constituency as a voter for the purpose of elections to the National Assembly shall, unless he is disqualified by Parliament from voting in such elections on grounds of his having been convicted of an offence in connection with elections or, on the grounds of his having been reported guilty of such an offence by the court trying an election petition or, on the grounds of his being in lawful custody at the date of the election, be entitled so to vote in that constituency in accordance with the provisions made by or under an Act of Parliament, and no other person may so vote.

(As amended by Act No. 18 of 1996)

76. [Electoral Commission]

(1) There is hereby established an autonomous Electoral Commission to supervise the registration of voters, to conduct Presidential and Parliamentary elections and to review the boundaries of the constituencies into which Zambia is divided for the purposes of elections to the National Assembly.

(2) An Act of Parliament shall provide for the composition and operations of the Electoral Commission appointed by the President under this Article.

(As amended by Act No. 18 of 1996)

77. [Constituencies and elections]

(1) Zambia shall be divided into constituencies, for purposes of elections to the National Assembly so that the number of such constituencies, the boundaries of which shall be such as an Electoral Commission prescribes, shall be equal to the number of seats of elected members in the National Assembly.

(2) In delimiting the constituencies, the Commission shall have regard to the availability of means of communication and the geographical features of the area to be divided into constituencies:

Provided that the constituencies shall be so delimited that there shall be at least ten constituencies in each administrative Province.

(3) Each constituency shall return one member only to the National Assembly.

(4) The boundaries of each constituency shall be such that the number of inhabitants thereof is as nearly equal to the population quota as is reasonably practicable:

Provided that the number of inhabitants of a constituency may be greater or less than the population quota in order to take account of means of communication, geographical features and the difference between urban and rural areas in respect of density of population and to take account of the proviso to clause (2).

78. [Exercise of legislative power of Parliament]

(1) Subject to the provisions of this Constitution, the legislative power of Parliament shall be exercised by Bills passed by the National Assembly and assented to by the President.

(2) No bill (other than such a Bill as is mentioned in Article 27) shall be presented to the President until after the expiration of three days from the third reading of the Bill by the National Assembly, and where a Bill is referred to a tribunal in accordance with Article 27, that Bill shall not be presented to the President for assent until the tribunal has reported on the Bill or the time for making a report has expired, whichever is the earlier.

(3) Where a Bill is presented to the President for assent he shall either assent or withhold his assent.

(4) Subject to clause (5), where the President withholds his assent to a Bill, the President may return the Bill to the National Assembly with a message requesting that the National Assembly reconsiders the Bill or any specified provision thereof and, in particular, any such amendments as he may recommend in his message, and when a Bill is so returned, the National Assembly shall reconsider the Bill accordingly, and if the Bill is passed by the National Assembly on a vote of not less than two thirds of all the members of the National Assembly, with or without amendment, and presented to the President for assent, the President shall assent to the Bill within twenty-one days of its presentation, unless he sooner dissolves Parliament.

(5) Notwithstanding clause (4), where the President withholds his assent to a Bill, the Bill shall not again be presented for assent.

(6) Where a bill that has been duly passed is assented to in accordance with the provisions of this Constitution it shall become law and the President shall thereupon cause it to be published in the *Gazette* as a law.

(7) No law made by Parliament shall come into operation until it has been published in the *Gazette*, but Parliament may postpone the coming into operation of any such law and may make laws with retrospective effect.

(8) All laws made by Parliament shall be styled "Acts" and the words of enactment shall be "Enacted by the Parliament of Zambia".

(As amended by Act No. 18 of 1996)

79. [Alteration of Constitution]

(1) Subject to the provisions of this Article, Parliament may alter this Constitution or the Constitution of Zambia Act, 1991.

(2) Subject to clause (3) a bill for the alteration of this Constitution or the Constitution of Zambia Act, 1991 shall not be passed unless --

(a) not less than thirty days before the first reading of the bill in the National Assembly the text of the bill is published in the *Gazette*; and

(b) the bill is supported on second and third readings by the votes of not less than two thirds of all the members of the Assembly.

(3) A bill for the alteration of Part III of this Constitution or of this Article shall not be passed unless before the first reading of the bill in the National Assembly it has been put to a National referendum with or without amendment by not less than fifty per cent of persons entitled to be registered as voters for the purposes of Presidential and parliamentary elections.

(4) Any referendum conducted for the purposes of clause (3) shall be so conducted and supervised in such manner as may be prescribed by or under an Act of Parliament.

(5) In this Article --

(a) references to this Constitution or the Constitution of Zambia Act, 1991 include reference to any law that amends or replaces any of the provisions of this Constitution or that Act; and

(b) references to the alteration of this Constitution or the Constitution of Zambia Act, 1991 or of any Part of Article include references to the amendment, modification or re-enactment with or without amendment or modification, of any provision for the time being contained in this Constitution, that Act, Part or Article, the suspension or repeal or any such provision and the making of different provision in lieu of such provision, and the addition of new provisions, to this Constitution, that Act, Part or Article.

(6) Nothing in this Article shall be so construed as to require the publication of any amendment to any such bill as is referred to in clause (2) proposed to be moved in the National Assembly.

80. [Statutory instruments]

(1) Nothing in Article 62 shall prevent Parliament from conferring on any person or authority power to make statutory instruments.

(2) Every statutory instrument shall be published in the *Gazette* not later than twenty-eight days after it is made or, in the case of a statutory instrument which will not have the force of law unless it is approved by some person or authority other than the person or authority by

which it was made, not later than twenty-eight days after it is so approved, and if it is not so published it shall be void from the date on which it was made.

(3) Where a tribunal appointed under Article 27 reports to the President that any provision of a statutory instrument is inconsistent with any provision of this Constitution, the President may, by order annul that statutory instrument and it shall thereupon be void from the date on which it was made.

(As amended by Act No. 18 of 1996)

81. [Restrictions with regard to certain financial measures]

Except upon the recommendation of the President signified by the Vice-President or a Minister, the National Assembly shall not --

(a) proceed upon any Bill (including an amendment to a Bill) that, in the opinion of the person presiding, makes provision for any of the following purposes:

- (i) for the imposition of taxation or the alteration of taxation otherwise than by reduction;
- (ii) for the imposition of any charge upon the general revenues of the Republic or the alteration of any such charge otherwise than by reduction;
- (iii) for the payment, issue or withdrawal from the general revenues of the Republic of any moneys not charged thereon or any increase in the amount of such payment, issue or withdrawal; or
- (iv) for the composition or remission of any debt due to the Government; or

(b) proceed upon any motion (including any amendment to a motion) the effect of which, in the opinion of the person presiding, would be to make provision for any of those purposes.

(As amended by Act No. 18 of 1996)

82. [President may address National Assembly]

(1) The President may, at any time, attend and address the National Assembly.

(2) The President may send messages to the National Assembly and any such message shall be read, at the first convenient sitting of the National Assembly after it is received, by the Vice-President or by a Minister designated by the President.

(As amended by Act No. 18 of 1996)

83. [Presiding National Assembly]

There shall preside at any sitting of the National Assembly --

- (a) the Speaker of the National Assembly;
- (b) in the absence of the Speaker, the Deputy Speaker; or
- (c) in the absence of the Speaker and of the Deputy Speaker, such member of the Assembly as the Assembly may elect for that purpose.

(As amended by Act No. 18 of 1996)

84. [Voting and quorum]

(1) Except as otherwise provided in this Constitution all questions at any sitting of the National Assembly shall be determined by a majority of votes of the members present and voting other than the Speaker or the person acting as Speaker as the case may be.

(2) The Speaker or person acting as such shall not vote in the first instance, but shall have and exercise a casting vote if there is an equality of votes.

(3) The National Assembly shall have power to act notwithstanding any vacancy in the membership thereof, and any proceedings in the National Assembly shall be valid notwithstanding that it is discovered subsequently that some person who was not entitled to do so, voted or otherwise took part in the proceedings.

(4) The quorum for a meeting of the National Assembly shall be one third of the total number of members of the National Assembly and if at any time during a meeting of the National Assembly objection is taken by any member present that there is no quorum, it shall be the duty of the Speaker or person acting as such, either to adjourn the National Assembly or, as he may think fit, to suspend the meeting until there is a quorum.

(As amended by Act No. 18 of 1996)

85. [Unqualified persons sitting or voting]

Any person who sits or votes in the National Assembly knowing or having reasonable grounds for knowing that he is not entitled to do so, shall be liable to a penalty not exceeding one thousand penalty units or such other sum as may be prescribed by Parliament for each day on which he so sits or votes, which penalty shall be recoverable by action in the High Court at the suit of the Attorney-General.

(As amended by Act No. 18 of 1996)

86. [Procedure in National Assembly]

(1) Subject to the provisions of this Constitution, the National Assembly may determine its own procedure.

(2) The National Assembly may act notwithstanding any vacancy in its membership (including any vacancy not filled when the National Assembly first meets after any dissolution of Parliament) and the presence or participation of any person not entitled to be present or to participate in the proceedings of the National Assembly shall not invalidate those proceedings.

(3) In the selection of members of committees, the National Assembly shall seek to ensure that equitable representation of the political parties or groups that are represented in the National Assembly as well as of the members not belonging to any such parties or groups.

(As amended by Act No. 18 of 1996)

87. [Privileges and immunities of National Assembly]

(1) The National Assembly and its members shall have such privileges, powers and immunities as may be prescribed by an Act of Parliament.

(2) Notwithstanding subclause (1) the law and custom of the Parliament of England shall apply to the National Assembly with such modifications as may be prescribed by or under an Act of Parliament.

(As amended by Act No. 18 of 1996)

88. [Dissolution of Parliament and related matters]

(1) Subject to the provisions of clause (4) each session of Parliament shall be held at such place within Zambia and shall commence at such time as the President may appoint.

(2) There shall be a session of Parliament at least once every year so that a period of twelve months shall not intervene between the last sitting of the National Assembly in one session and the commencement of the next session.

(3) The President may at any time summon a meeting of the National Assembly.

(4) Subject to the provisions of clause (1) of Article 37, the sittings of the National Assembly in any session of Parliament after the commencement of that session shall be held at such times and on such days as the National Assembly shall appoint.

(5) The President may at any time prorogue Parliament.

(6) Subject to clause (9) the National Assembly --

(a) shall, unless sooner dissolved, continue for five years from the date of its first sitting after the commencement of this Constitution or after any dissolution and shall then stand dissolved;

(b) may, by a two thirds majority of the members thereof dissolve itself; or

(c) may be dissolved by the President at any time.

(7) Whenever the National Assembly is dissolved under this Article, there shall be Presidential elections and elections to the National Assembly and the first session of the new Parliament shall commence within three months from the date of the dissolution.

(8) At any time when the Republic of Zambia is at war, Parliament may from time to time extend the period of five years specified in clause (6) for not more than twelve months at a time:

Provided that the life of the National Assembly shall not be extended under this clause for more than five years.

(9) If, after a dissolution of Parliament and before the holding of the general elections, the President considers that owing to the existence of a state of war or of a state of emergency in Zambia or any part thereof, it is necessary to recall Parliament, the President may summon the Parliament that has been dissolved to meet and that Parliament shall be deemed to be the Parliament for the time being, but the general election of members of the National Assembly shall proceed and the Parliament that has been recalled shall, if not sooner dissolved again, stand dissolved on the day appointed for the nomination of candidates in that general election.

(As amended by Act No. 18 of 1996)

89. [Oaths to be taken by Speaker and Members]

The Speaker of the National Assembly, before assuming the duties of his office, and every member of the National Assembly before taking his seat therein, shall take and subscribe before the National Assembly the oath of allegiance.

(As amended by Act No. 18 of 1996)

90. [The Investigator-General]

(1) There shall be an Investigator-General of the Republic who shall be appointed by the President in consultation with the Judicial Service Commission and shall be the Chairman of the Commission for Investigations.

(2) A person shall not be qualified for appointment as Investigator-General --

(a) unless he is qualified to be appointed a judge of the High Court; or

(b) if he holds the office of President, Vice-President, Minister or Deputy Minister, is a member of the National Assembly or is a public officer.

(3) Subject to the provisions of this section, a person appointed Investigator-General shall vacate his office on attaining the age of sixty-five years:

Provided that the President may permit a person who has attained that age to continue in office for such period as may be necessary to complete and submit any report on, or do any other thing in relation to, any investigation that was commenced by him before the attained age.

(4) A person appointed as Investigator-General shall forthwith vacate any office prescribed by an Act of Parliament.

(5) A person appointed as Investigator-General may be removed from office for incompetence or inability to perform the functions of his office (whether arising from

infirmity of body or mind or from any other cause) or from misbehaviour, but shall not be so removed except in accordance with the provisions of this Article.

(6) If the National Assembly by resolution supported by the votes of not less than two-thirds of all the members of that House, resolves that the question of removing the Investigator-General ought to be investigated, the Speaker of the National Assembly shall send a copy to the Chief Justice who shall appoint a tribunal consisting of a Chairman and two other persons to inquire into the matter.

(7) The Chairman and one other member of the tribunal shall be persons who hold or have held high judicial office.

(8) The tribunal shall inquire into the matter and report thereon to the President.

(9) Where such a tribunal advises the President that the Investigator-General ought to be removed from office for incompetence or inability or for misbehaviour, the President shall remove the Investigator-General from office.

(10) If the question of removing the Investigator-General from office has been referred to a tribunal under this Article, the President may suspend him from performing any functions of his office, and any such suspension may at any time be revoked by the President and shall in any case cease to have effect if the tribunal shall advise the President that the Investigator-General ought not to be removed.

(11) If there is a vacancy in the office of the Investigator-General, or if the Investigator-General is temporarily absent from Zambia or otherwise unable to exercise the functions of his office, the President may appoint a person qualified to be a Judge of the High Court to exercise the functions of the office of the Investigator-General under this Article.

(12) A person appointed to the office of Investigator-General may resign upon giving three months' notice to the President.

(13) The functions, powers and procedures of the Investigator-General shall be as provided by an Act of Parliament.

(As amended by Act No. 18 of 1996)

PART VI

THE JUDICATURE

(As amended by Act No. 18 of 1996)

Article

91. [Courts]

(1) The Judicature of the Republic shall consist of:

- (a) the Supreme Court of Zambia;
- (b) the High Court of Zambia;
- (c) the Industrial Relations Court;
- (d) the Subordinate Courts;
- (e) the Local Courts; and
- (f) such other courts as may be prescribed by an Act of Parliament.

(2) The Judges, members, magistrates and justices, as the case may be, of the courts mentioned in clause (1) shall be independent, impartial and subject only to this Constitution and the law and shall conduct themselves in accordance with a code of conduct promulgated by Parliament.

(3) The Judicature shall be autonomous and shall be administered in accordance with the provisions of an Act of Parliament.

92. [Supreme Court]

(1) There shall be a Supreme Court of Zambia which shall be the final court of appeal for the Republic and shall have such jurisdiction and powers as may be conferred on it by this Constitution or any other law.

(2) The judges of the Supreme Court shall be --

- (a) the Chief Justice;
- (b) the Deputy Chief Justice;
- (c) seven Supreme Court judges or such greater number as may be prescribed by an Act of Parliament.

(3) The office of the Chief Justice, Deputy Chief Justice or of a Supreme Court Judge shall not be abolished while there is a substantive holder thereof.

(4) The Supreme Court shall be a superior court of record, and, except as otherwise provided by Parliament, shall have all the powers of such a court.

(5) When the Supreme Court is determining any matter, other than an interlocutory matter, it shall be composed of an uneven number of judges not being less than three except as provided for under Article 41.

(6) The Chief Justice may make rules with respect to the practice and procedure of the Supreme Court in relation to jurisdiction and powers of the Supreme Court.

93. [Appointment of judges of Supreme Court]

(1) The Chief Justice and Deputy Chief Justice shall, subject to ratification by the National Assembly, be appointed by the President.

(2) The judges of the Supreme Court shall, subject to ratification by the National Assembly, be appointed by the President.

(3) If the office of Chief Justice is vacant or if the Chief Justice is on leave or is for any reason unable to perform the functions of that office, then, until a person has been appointed to, and has assumed the functions of, that office or until the person holding that office has resumed those functions, as the case may be, the President may appoint the Deputy Chief Justice or a Supreme Court judge to perform such functions.

(4) Without prejudice to the generality of clause (5), if the office of Deputy Chief Justice is vacant or the Deputy Chief Justice is on leave or is for any other reason unable to perform the functions of his office, the President may appoint another judge of the Supreme Court to act as Deputy Chief Justice.

(5) If the office of a Supreme Court judge is vacant, or if any Supreme Court judge is appointed to act as Chief Justice or Deputy Chief Justice, or if any Supreme Court judge is on leave or is for any reason unable to perform the functions of that office, the President may appoint a person qualified for appointment as a judge of the Supreme Court to act as a Supreme Court judge.

(6) A person may act as the Chief Justice, Deputy Chief Justice or a Supreme Court judge notwithstanding that he has attained the age prescribed by Article 98.

(6) A puisne judge appointed to act as Deputy Chief Justice or Supreme Court judge, as the case may be, pursuant to clause (4) or (5), shall continue to be a judge of the High Court and may continue to perform the functions of the office of puisne judge.

94. [High Court]

(1) There shall be a High Court for the Republic which shall have, except as to the proceedings in which the Industrial Relations Court has exclusive jurisdiction under the Industrial and Labour Relations Act [Act No. 27 of 1993], unlimited or original jurisdiction to hear and determine any civil or criminal proceedings under any law and such jurisdiction and powers as may be conferred on it by this Constitution or any other law.

(2) The High Court shall be divided into such divisions as may be determined by an Act of Parliament

(3) The Chief Justice shall be an ex-officio judge of the High Court.

(4) The other judges of the High Court shall be such number of puisne judges as may be prescribed by Parliament.

(5) The office of a puisne judge shall not be abolished while there is a substantive holder thereof.

(6) The High Court shall be a superior court of record and, except as otherwise provided by Parliament, shall have the powers of such a court.

(7) The High Court shall have jurisdiction to supervise any civil or criminal proceedings before any subordinate court or any court-martial and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by any such court.

(8) The Chief Justice may make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it by clause (7).

95. [Appointment of Puisne Judges, Chairman and Deputy Chairmen of the Industrial Relations Court]

(1) The puisne judges shall, subject to ratification by the National Assembly, be appointed by the President on the advice of the Judicial Service Commission.

(2) The Chairman and Deputy Chairman of the Industrial Relations Court shall be appointed by the President on the advice of the Judicial Service Commission.

(3) The provisions of Articles 98 and 99 shall apply to the Chairman and the Deputy Chairman of the Industrial Relations Court, with the necessary modifications.

96. [Acting judge of Supreme Court or of the High Court to act or hold office until appointment expires or is revoked]

(1) Any person appointed under Article 93 to act as a judge of the Supreme Court shall continue to act for the period of that person's appointment or, if no such period is specified, until his appointment is revoked by the President:

Provided that the President may permit a person whose appointment to act as a judge of the Supreme Court has expired or been revoked to continue to act for such period as may be necessary to enable that person to deliver judgement or to do any other thing in relation to proceedings that were commenced before such person.

97. [Qualifications for appointment as Supreme Court judge, puisne judge, Chairman and Deputy Chairman of the Industrial Relations Court]

(1) Subject to clause (2), a person shall not be qualified for appointment as a judge of the Supreme Court, a puisne judge or Chairman or Deputy Chairman of the Industrial Relations Court unless --

(a) he holds or has held high judicial office; or

(b) he holds one of the specified qualifications and has held one or other of the following qualifications --

(i) in the case of a Supreme Court Judge, for a total period of not less than fifteen years; or

(ii) in the case of a puisne judge, the Chairman and Deputy Chairman of the Industrial Relations Court, for a total period of not less than ten years.

(2) Where the President or the Judicial Service Commission, as the case may be, is satisfied that, by reason of special circumstances, a person who holds one of the specified qualifications is worthy, capable and suitable to be appointed as a judge of the Supreme Court, a puisne judge, or Chairman or Deputy Chairman of the Industrial Relations Court, notwithstanding that he has not held one or other of those qualifications for a total period of not less than fifteen or ten years, as the case may be, the President acting in the case of a judge of the Supreme Court, puisne judge or Chairman or Deputy Chairman of the Industrial Relations Court in accordance with the advice of the Judicial Service Commission, may dispense with the requirement that such person shall have holds one or other of the specified qualifications for a total period of not less than the period specified in clause (1).

(3) In this Article, "the specified qualifications" means the professional qualifications specified in the Legal Practitioners Act [Cap. 48], one of which must be held by any person before he may apply under that Act to be admitted as a practitioner in the Republic.

(4) For the purposes of this Article and of Articles 93 and 94, "a person qualified for appointment" means a judge of the Supreme Court, a puisne judge or Chairman or Deputy Chairman of the Industrial Relations Court and includes a person in respect of whom the President or Judicial Service Commission, as the case may be, is satisfied as provided for in clause (2).

98. [Tenure of office of judges of Supreme and High Court]

(1) Subject to the provisions of this Article, a person holding the office of a judge of the Supreme Court or the office of a judge of the High Court shall vacate that office on attaining the age of sixty-five years:

Provided that the President --

(a) may permit a judge of the High Court in accordance with the advice of the Judicial Service Commission, or a judge of the Supreme Court, who has attained that age to continue in office for such period as may be necessary to enable him to deliver judgement or to do any other thing in relation to proceedings that were commenced before him before he attained that age:

(b) may appoint a judge of the High Court in accordance with the advice of the Judicial Service Commission or a judge of the Supreme Court, who has attained the age of sixty-five years, for such further period, not exceeding seven years, as the President may determine.

(2) A judge of the Supreme Court, High Court, Chairman or Deputy Chairman of the Industrial Relations Court may be removed from office only for inability to perform the functions of his office, whether arising from infirmity of body or mind, incompetence or misbehaviour and shall not be so removed except in accordance with the provisions of this Article.

(3) If the President considers that the question of removing a judge of the Supreme Court or of the High Court under this Article ought to be investigated, then --

(a) he shall appoint a tribunal which shall consist of a Chairman and not less than two other members, who hold or have held high judicial office;

(b) the tribunal shall inquire into the matter and report on the facts thereof to the President and advise the President whether the judge ought to be removed from office under this Article for inability as aforesaid or for misbehaviour.

(4) Where a tribunal appointed under clause (3) advises the President that a judge of the Supreme Court or of the High Court ought to be removed from office for inability, or incompetence or for misbehaviour, the President shall remove such judge from office.

(5) If the question of removing a judge of the Supreme Court or of the High Court from office has been referred to a tribunal under clause (3), the President may suspend the judge from performing the functions of his office, and any such suspension may at any time be revoked by the President and shall in any case cease to have effect if the tribunal advises the President that the judge ought not to be removed from office.

(6) The provisions of this Article shall be without prejudice to the provisions of Article 96.

99. [Oaths to be taken by judge]

A judge of the Supreme Court or of the High Court shall not enter upon the duties of his office unless he has taken and subscribed the oath of allegiance and such oath for the due execution of his office as may be prescribed by or under an Act of Parliament:

Provided that a person who has once taken and subscribed to the said oaths may enter upon the duties of any such office without again taking and subscribing such oaths.

PART VII

DEFENCE AND NATIONAL SECURITY

(As amended by Act No. 18 of 1996)

Article

100. [The Zambia Defence Force]

(1) There shall be an armed force to be known as the Zambia Defence Force.

(2) The Zambia Defence Force shall be non-partisan, national in character, patriotic, professional, disciplined, productive and subordinate to the civilian authority as established under this Constitution.

(3) Members of the Zambia Defence Force shall be citizens of Zambia and of good character.

(4) No person shall raise an armed force except in accordance with this Constitution.

101. [Functions of Defence Force]

The functions of the Zambia Defence Force shall be to --

- (a) preserve and defend the sovereignty and territorial integrity of Zambia;
- (b) co-operate with the civilian authority in emergency situations and in cases of natural disasters;
- (c) foster harmony and understanding between the Zambia Defence Force and civilians; and
- (d) engage in productive activities for the development of Zambia.

102. [Parliament to regulate Defence Force]

Parliament shall make laws regulating the Zambia Defence Force, and in particular, providing for--

- (a) the organs and structures of the Zambia Defence Force;
- (b) the recruitment of persons into the Zambia Defence Force from every district of Zambia;
- (c) the terms and conditions of service of members of the Zambia Defence Force; and
- (d) the deployment of troops outside of Zambia.

103. [The Zambia Police Force]

(1) There shall be a police force to be known as the Zambia Police Force and such other police forces as Parliament may by law prescribe.

(2) Subject to the other provisions of this Constitution, every police force in Zambia shall be organised and administered in such a manner and shall have such functions as Parliament may by law prescribe.

(3) The Zambia Police Force shall be nationalistic, patriotic, professional, disciplined, competent and productive; and its members shall be citizens of Zambia and in good character.

104. [Functions of Zambia Police Force]

The functions of the Zambia Police Force shall include the following:

- (a) to protect life and property;
- (b) to preserve law and order;
- (c) to detect and prevent crime;

(d) to co-operate with the civilian authority and other security organs established under this Constitution and with the population generally.

105. [Parliament to regulate Zambia Police Force]

Parliament shall make laws regulating the Zambia Police Force, and in particular, providing for --

- (a) the organs and structures of the Zambia Police Force;
- (b) the recruitment of persons into the Zambia Police Force from every district of Zambia;
- (c) terms and conditions of service of members of the Zambia Police Force; and
- (d) the regulation generally of the Zambia Police Force.

106. [Prison service]

There shall be the Zambia Prison Service.

107. [Parliament to regulate Zambia Prison Service]

Parliament shall make laws regulating the Zambia Prison Service, and in particular, providing for --

- (a) the organs and structures of the Zambia Prison Service;
- (b) the recruitment of persons to the Zambia Prison Service from every district of Zambia;
- (c) the terms and conditions of service of members of the Zambia Prison Service; and
- (d) the regulation generally of the Zambia Prison Service.

108. [Zambia Security Intelligence Services]

(1) There shall be a Zambia Security Intelligence Service.

(2) Parliament shall make laws regulating the Zambia Security Intelligence Service, and in particular, providing for --

- (a) the organs and structures of the Zambia Security Intelligence Service;
- (b) the recruitment of persons into the Zambia Security Intelligence Service from every district of Zambia;
- (c) the terms and conditions of service of members of the Zambia Security Intelligence Service; and
- (d) the regulation generally of the Zambia Security Intelligence Service.

PART VIII

LOCAL GOVERNMENT SYSTEM

(As amended by Act No. 18 of 1996)

Article

109. [Local Government system]

- (1) There shall be such system of local government in Zambia as may be prescribed by an Act of Parliament.
- (2) The system of local government shall be based on democratically elected councils on the basis of universal adult suffrage.

PART IX

DIRECTIVE PRINCIPLES OF STATE POLICY AND THE DUTIES OF A CITIZEN

(As amended by Act No. 18 of 1996)

Article

110. [Application of Directive Principles of State Policy]

(1) The Directive Principles of State Policy set out in this Part shall guide the Executive, the Legislature and the Judiciary, as the case may be, in the --

- (a) development of national policies;
- (b) implementation of national policies;
- (c) making and enactment of laws; and
- (d) application of the Constitution and any other law.

(2) The application of the Directive Principles of State Policy may be observed only in so far as State resources are able to sustain their application, or if the general welfare of the public so unavoidably demands, as may be determined by Cabinet.

111. [Directives not to be justiciable]

The Directive Principles of State Policy set out in this Part shall not be justiciable and shall not thereby, by themselves, despite being referred to as rights in certain instances, be legally enforceable in any court, tribunal or administrative institution or entity.

112. [Directive Principles of State Policy]

The following Directives shall be the Principles of State Policy for the purposes of this Part: the State shall be based on democratic principles;

- (b) the State shall endeavour to create an economic environment which shall encourage individual initiative and self reliance among the people and promote private investment;
- (c) the State shall endeavour to create conditions under which all citizens shall be able to secure adequate means of livelihood and opportunity to obtain employment;
- (d) the State shall endeavour to provide clean and safe water, adequate medical and health facilities and decent shelter for all persons, and take measures to constantly improve such facilities and amenities;

- (e) the State shall endeavour to provide equal and adequate educational opportunities in all fields and at all levels for all;
- (f) the State shall endeavour to provide to persons with disabilities, the aged and other disadvantaged persons such social benefits and amenities as are suitable to their needs and are just and equitable;
- (g) the State shall take measures to promote the practice, enjoyment and development by any person of that person's culture, tradition, custom and language insofar as these are not inconsistent with this Constitution;
- (h) the State shall strive to provide a clean and healthy environment for all;
- (i) the State shall promote sustenance, development and public awareness of the need to manage the land, air and water resources in a balanced and suitable manner for the present and future generation; and
- (j) the State shall recognise the right of every person to fair labour practices and safe and healthy working conditions.

113. [Duties of the citizens]

It shall be the duty of every citizen to —

- (a) be patriotic and loyal to Zambia and to promote its well-being;
- (b) contribute to the well-being of the community where that citizen lives, including the observance of health controls;
- (c) foster national unity and live in harmony with others;
- (d) promote democracy and the rule of law;
- (e) vote in national and local government elections;
- (f) provide defence and military service when called upon;
- (g) carry out with discipline and honesty legal public functions;
- (h) pay all taxes and duties legally due and owing to the State; and
- (i) assist in the enforcement of the law at all times.

PART X

FINANCE

(As amended by Act No. 18 of 1996)

Article

114. [Imposition of taxation]

- (1) Subject to the provisions of this Article, no taxation shall be imposed or altered except by or under an Act of Parliament.

(2) Except as provided by clauses (3) and (4), Parliament shall not confer upon any other person or authority power to impose or to alter, otherwise than by reduction, any taxation.

(3) Parliament may make provision under which the President or the Vice-President or a Minister may by order provide that, on or after the publication of a Bill being a Bill approved by the President that it is proposed to introduce into the National Assembly and providing for the imposition or alteration of taxation, such provisions of the Bill as may be specified in the order shall, have the force of law for such period and subject to such conditions as may be prescribed by Parliament:

Provided that any such order shall, unless sooner revoked, cease to have effect --

(i) if the Bill to which it relates is not passed within such period from the date of its first reading in the National Assembly as may be prescribed by Parliament;

(ii) if, after the introduction of the Bill to which it relates, Parliament is prorogued or the National Assembly is dissolved;

(iii) if, after the passage of the Bill to which it relates, the President refuses his assent thereto;
or

(iv) at the expiration of a period of four months from the date on which it came into operation or such longer period from the date as may be specified in any resolution passed by the National Assembly after the Bill to which it relates has been introduced.

(4) Parliament may confer upon any authority established by law for the purposes of local government power to impose taxation within the area for which that authority is established and to alter taxation so imposed.

(5) Where the Appropriation Act in respect of a financial year has not come into force at the expiration of six months from the commencement of that financial year, the operation of any law relating to the collection or recovery of any tax upon any income or profits or any duty or customs or excise shall be suspended until that Act comes into force:

Provided that --

(i) in any financial year in which the National Assembly stands dissolved at the commencement of that year the period of six months shall begin from the day upon which the National Assembly first sits following that dissolution instead of from the commencement of the financial year;

(ii) the provisions of this clause shall not apply in any financial year in which the National Assembly is dissolved after the laying of estimates in accordance with Article 115 and before the Appropriation by Parliament.

115. [Withdrawal of moneys from general revenues]

- (1) No moneys shall be expended from the general revenues of the Republic unless --
- (a) the expenditure is authorised by a warrant under the hand of the President;
 - (b) the expenditure is charged by this Constitution or any other law on the general revenues of the Republic; or
 - (c) the expenditure is of moneys received by a department of government and is made under the provisions of any law which authorises that department to retain and expend those moneys for defraying the expenses of the department.
- (2) No warrant shall be issued by the President authorising expenditure from the general revenues of the Republic unless --
- (a) the expenditure is authorised by an Appropriation Act;
 - (b) the expenditure is necessary to carry on the services of the Government in respect of any period, not exceeding four months, beginning at the commencement of a financial year during which the Appropriation Act for that financial year is not in force;
 - (c) the expenditure has been proposed in a supplementary estimate approved by the National Assembly;
 - (d) no provision exists for the expenditure and the President considers that there is such an urgent need to incur the expenditure that it would not be in the public interest to delay the authorisation of the expenditure until such time as a supplementary estimate can be laid before and approved by the National Assembly; or
 - (e) the expenditure is incurred on capital projects continuing from the previous financial year and is so incurred before commencement of the Appropriation Act for the current financial year.
- (3) the President shall, immediately after he signs any warrant authorising expenditure from the general revenues of the Republic, cause a copy of the warrant to be transmitted to the Auditor-General.
- (4) The issue of warrants under paragraph (d) of clause (2), the investment of moneys forming part of the general revenues of the Republic and the making of advances from such revenues shall be subject to such limitations and conditions as Parliament may from time to time prescribe.
- (5) For the purposes of this Article the investment of moneys forming part of the general revenues of the Republic or the making of recoverable advances therefrom shall not be regarded as expenditure, and the expression "investment of moneys" means investment in readily marketable securities and deposits with a financial institution approved by the Minister responsible for finance.

116. [Supplementary estimates in respect of expenditure authorised by warrant]

Where in any financial year any expenditure has been authorised by a warrant issued by the President under paragraph (d) of clause (2) Article 113, the Minister responsible for finance shall cause a supplementary estimate relating to that expenditure to be laid before the National Assembly for its approval before the expiration of a period of four months from the issue of the warrant or, if the National Assembly is not sitting at the expiration of that period, at the first sitting of the National Assembly thereafter.

117. [Appropriation Acts and Supplementary Appropriation Acts]

(1) The Minister responsible for finance shall cause to be prepared and shall lay before the National Assembly within three months after the commencement of each financial year estimates of the revenues and expenditure of the Republic for that financial year.

(2) When the estimates of expenditures have been approved by the National Assembly, the heads of the estimates together with the amount approved in respect of each shall be included in a Bill to be known as an Appropriation Bill which shall be introduced in the National Assembly to provide for the payment of those amounts for the purposes specified out of the general revenues of the Republic.

(3) Nothing in this Article shall be construed as requiring the approval of the National Assembly for that part of any estimates which relate to, or as requiring the inclusion in an Appropriation Bill of provisions authorising the expenditure of, sums which are charged on the general revenues of the Republic by this Constitution or any other law.

(4) Where any supplementary expenditure has been authorised in respect of any financial year for any purpose and --

(a) no amount has been appropriated for that purpose under any head of expenditure by the Appropriation Act for that financial year; or

(b) the amount of the supplementary expenditure is such that the total amount expended for the purposes of the head of expenditure in which expenditure for that purpose was included is in excess of the amount so appropriated under that head, the Minister responsible for finance shall introduce in the National Assembly not later than fifteen months after the end of that financial year or, if the National Assembly is not sitting at the expiration of that period, within one month of the first sitting of the National Assembly thereafter, a Bill, to be known as a Supplementary Appropriation Bill, confirming the approval of Parliament of such expenditure, or excess of expenditure, as the case may be.

(5) Where in any financial year, expenditure has been incurred without the authorisation of Parliament, the Minister responsible for finance shall, on approval of such expenditure by the

appropriate committee of the National Assembly, introduce in the National Assembly, not later than thirty months after the end of that financial year or, if the National Assembly is not sitting at the expiration of that period, within one month of the first sitting of the National Assembly thereafter, a Bill to be known as the Excess Expenditure Appropriation Bill, for the approval by Parliament of such expenditure.

118. [Financial report]

(1) The Minister responsible for finance shall cause to be prepared and shall lay before the National Assembly not later than nine months after the end of each financial year a financial report in respect of that year.

(2) A financial report in respect of the financial year shall include accounts showing the revenue and other moneys received by the Government in that financial year, the expenditure of the Government in that financial year other than expenditure charged by this Constitution or any other law on the general revenues of the Republic, the payments made in the financial year otherwise than for the purposes of expenditure, a statement of the financial position of the Republic at the end of the financial year and such other information as Parliament may prescribe.

119. [Remuneration of certain officers]

(1) There shall be paid to the holders of the offices to which this Article applies such salary and such allowances as may be prescribed by or under an Act of Parliament.

(2) The salaries and any allowances payable to the holders of the offices to which this Article applies shall be a charge on the general revenues of the Republic.

(3) The salary payable to the holder of any office to which this Article applies and his terms of office shall not be altered to his disadvantage after his appointment.

(4) Where a person's salary or terms of office depend upon his option, the salary or terms for which he opts shall, for the purposes of clause (3), be deemed to be more advantageous to him than any others for which he might have opted.

(5) This Article applies to the offices of judge of the Supreme Court, Attorney-General, judge of the High Court, Investigator-General, Solicitor-General, Director of Public Prosecutions, Secretary to Cabinet and Auditor-General and to such other offices as may be prescribed by an Act of Parliament.

120. [Public debt]

(1) There shall be charged on the general revenues of the Republic all debt charges for which the Government is liable.

(2) For the purposes of the Article, debt charges include interest, sinking fund charges, the repayment or amortisation of debt, and all expenditure in connection with the raising of loans on the security of the revenues of the former Protectorate of Northern Rhodesia or the Republic and on the service and redemption of debt thereby created.

121. [Auditor-General]

(1) There shall be an Auditor-General for the Republic whose office shall be a public office and who shall, subject to ratification by the National Assembly, be appointed by the President.

(2) It shall be the duty of the Auditor General --

(a) to satisfy himself that the provisions of this Part are being complied with;

(b) to satisfy himself that the moneys expended have been applied to the purposes for which they were appropriated by the Appropriation Act or in accordance with the approved supplementary estimates, or in accordance with the Excess Expenditure Appropriation Act, as the case may be, and that the expenditure conforms to the authority that governs it;

(c) to audit the accounts relating to the general revenues of the Republic and the expenditure of moneys appropriated by Parliament, the National Assembly, the Judicature, the accounts relating to the stocks and stores of the Government and the accounts of such other bodies as may be prescribed by or under any law;

(d) to audit the accounts relating to any expenditure charged by this Constitution or any other law on the general revenues of the Republic and to submit a report thereon to the President not later than twelve months after the end of each financial year.

(3) The Auditor-General and any officer authorised by him shall have access to all books, records, reports and other documents relating to any of the accounts referred to in clause (2).

(4) The Auditor-General shall, not later, than twelve months after the end of each financial year, submit a report on the accounts referred to in paragraph (c) of clause (2) in respect of that financial year to the President who shall, not later than seven days after the first sitting of the National Assembly next after the receipt of such report, cause it to be laid before the National Assembly; and if the President makes default in laying the report before the National Assembly, the Auditor-General shall submit the report to the Speaker of the National Assembly, or if the office of Speaker is vacant or if the Speaker is for any reason unable to perform the functions of his office, to the Deputy Speaker, who shall cause it to be laid before the National Assembly.

(5) The Auditor-General shall perform such other duties and exercise such other powers in relation to all accounts of the Government or the accounts of other public authorities or other bodies as may be prescribed by or under any law.

(6) In the exercise of his functions under clauses(2), (3) and (4), the Auditor-General shall not be subjected to the direction or control of any person or authority.

122. [Tenure of office of Auditor General]

(1) Subject to the provisions of this Article, a person holding the office of Auditor-General shall vacate his office when he attains the age of sixty years.

(2) A person holding the office of Auditor-General may be removed from office only for inability to perform the functions of his office, whether arising from infirmity of body or mind, or for incompetence or for misbehaviour and shall not be so removed except in accordance with the provisions of this Article.

(3) If the National Assembly resolves that the question of removing a person holding the office of Auditor-General from office under this Article ought to be investigated then --

(a) the National Assembly shall, by resolution, appoint a tribunal which shall consist of a Chairman and not less than two other members, who hold or have held high judicial office;

(b) the tribunal shall inquire into the matter and report on the facts thereof to the National Assembly;

(c) the National Assembly shall consider the report of the tribunal at the first convenient sitting of the National Assembly after it is received and may, upon such consideration, by resolution, remove the Auditor-General from office.

(4) If the question of removing a person holding the office of Auditor-General from office has been referred to a tribunal under this Article, the National Assembly may, by resolution, suspend that person from performing the functions of his office, and any such suspension may at any time be revoked by the Assembly by resolution and shall in any case cease to have effect if, upon consideration of the report of the tribunal in accordance with the provisions of this Article, the National Assembly does not remove the Auditor-General from office.

(5) A person who holds or has held the office of Auditor-General shall not be appointed to hold or to act in any other Public Office.

(6) A person who holds the office of Auditor-General may resign upon giving three months' notice to the President.

PART XI

SERVICE COMMISSIONS

(As amended by Act No. 18 of 1996)

Article

123. [Commissions]

(1) There shall be established for the Republic a Judicial Service Commission which shall have the functions conferred on it by this Constitution and such other functions and powers, as may be prescribed by or under an Act of Parliament.

(2) Parliament may establish for the Republic other Commissions which, together with the Judicial Service Commission, are hereafter collectively referred to as Service Commissions, which shall have such functions and powers in relation to the public service, or in relation to persons in public employment other than constitutional office holders or public officers, as may be prescribed by or under an Act of Parliament.

(3) Commissions other than Service Commissions may be established for the Republic by or under an Act of Parliament and shall have such functions and powers as may be prescribed by or under such an Act.

(4) Nothing in the foregoing precludes provision being made by or under an Act of Parliament to confer on a Service Commission functions and powers in relation to matters other than public employment.

124. [Pension laws and protection]

(1) The law to be applied with respect to any pension benefits that were granted to any person before the commencement of this Constitution shall be the law that was in force at the date on which those benefits were granted or any law in force at a later date that is not less favourable to that person.

(2) The law to be applied with respect to any pensions benefits not being benefits to which clause (1) applies, shall --

(a) in so far as those benefits are wholly in respect of a period of service as a public officer, as any officer in the department of the Clerk of the National Assembly, or as a member of the armed forces, that commenced before the commencement of this Constitution, be the law that was in force immediately before that date; and

(b) in so far as those benefits are wholly or partly in respect of a period of service as a public officer, as any officer in the department of the Clerk of the National Assembly, or as a member of the armed forces, that commenced after the commencement of this Constitution,

be the law in force on the date on which that period of service commenced; or any law in force at a later date that is not less favourable to that person.

(3) Where a person is entitled to exercise an option as to which of two or more laws shall apply in his case, the law for which he opts shall, for the purposes of this Article, be deemed to be more favourable to him than the other law or laws.

(4) All pensions benefits shall, except to the extent to which they are a charge on a fund established by or under any law and have been duly paid out of that fund to the person or authority to whom payment is due, be a charge on the general revenues of the Republic.

(5) In this Article "pension benefits" means any pensions, compensation, gratuities or other like allowances for persons in respect of their service as public officers, as officers in the department of the Clerk of the National Assembly or as members of the armed forces or for the widows, children, dependants or personal representatives of such persons in respect of such service.

(6) Reference in this Article to the law with respect to pension benefits include, without prejudice to their generality, references in the law regulating the circumstances in which such benefits may be granted or in which the grant of such benefits may be refused, the law regulating the circumstances in which any such benefits that have been granted may be withheld, reduced in amount or suspended, and the law regulating the amount of any such benefits:

Provided that, notwithstanding anything to the contrary contained in this Constitution or any other written law, such references shall not be so construed as to include the law regulating the law of compulsory retirement.

(7) In this Article --

(a) references to service as a public officer includes references to service as a public officer under the Government of the territories which on the 24th October, 1964, became the sovereign Republic of Zambia and references to service as a member of the teaching service of the said Government,

(b) references to service as an officer in the department of the Clerk of the National Assembly includes reference to service as an officer in the department of the Clerk of the Legislative Assembly of the said territories; and

(c) references to service as a member of the armed forces include references to service as a member of the armed forces of the said territories.

PART XII

HUMAN RIGHTS COMMISSION

(As amended by Act No. 18 of 1996)

Article

125. [Establishment of Human Rights Commission and its independence]

(1) There is hereby established a Human Rights Commission.

(2) The Human Rights Commission shall be autonomous.

126. [Functions, powers, composition, procedure, etc. of Human Rights Commission]

The functions, powers, composition, funding and administrative procedures, including the employment of staff, of the Human Rights Commission shall be prescribed by or under an Act of Parliament.

PART XIII

CHIEFS AND HOUSE OF CHIEFS

(As amended by Act No. 18 of 1996)

Article

127. [The Institution of Chief]

(1) Subject to the provisions of this Constitution, the Institution of Chief shall exist in any area of Zambia in accordance with the culture, customs and traditions or wishes and aspirations of the people to who it applies.

(2) In any community, where the issue of a Chief has not been resolved, the issue shall be resolved by the community concerned using a method prescribed by an Act of Parliament.

128. [Concept and principles relating to the Institution of Chiefs]

The following concepts and principles shall apply to Chiefs:

(a) the Institution of Chief shall be a corporation sole with perpetual succession and with capacity to sue and be sued and to hold assets or properties in trust for itself and the peoples concerned;

(b) nothing in paragraph (a) shall be taken to prohibit a Chief from holding any asset or property acquired in a personal capacity; and

(c) a traditional leader or cultural leader shall enjoy such privileges and benefits as may be conferred by the Government and the local government or as that leader may be entitled to under culture, custom and tradition.

129. [Chief not to be partisan]

A person shall not, while remaining a Chief, join or participate in partisan politics.

130. [House of Chiefs]

There shall be a House of Chiefs for the Republic which shall be an advisory body to the Government on traditional, customary and any other matters referred to it by the President.

131. [Functions of House of Chiefs]

Notwithstanding Article 130, the House of Chiefs may --

- (a) consider and discuss any Bill dealing with, or touching on, custom or tradition before it is introduced into the National Assembly;
- (b) initiate, discuss and decide on matters that relate to customary law and practice;
- (c) consider and discuss any other matter referred to it for its consideration by the President or approved by the President for consideration by the House; and
- (d) submit resolutions on any Bill or other matter referred to it to the President, and the President shall cause such resolutions to be laid before the National Assembly.

132. [Composition of House of Chiefs]

- (1) The House of Chiefs shall consist of twenty-seven Chiefs.
- (2) The members referred to in clause (1) shall consist of three chiefs elected by the Chiefs from each of the nine Provinces of the Republic.
- (3) The Chairman and the Vice-Chairman shall be elected from amongst the members.

133. [Tenure of office and vacancy]

- (1) A member of the House of Chiefs --
 - (a) shall hold office for a period of three years and may be re-elected for a further period of three years; or
 - (b) may resign upon giving one month's notice in writing to the Chairman.
- (2) The office of member shall become vacant --
 - (a) upon his death;
 - (b) if he ceases to be a Chief;
 - (c) if any other circumstances arise that would cause him to be disqualified for election;
 - (d) if he becomes a candidate to any election, or accepts an appointment, to any office in a political party;
 - (e) if he is adjudged or becomes an undischarged bankrupt; or
 - (f) if he is declared or becomes of unsound mind under any law in Zambia.

134. [Oaths of members of House of Chiefs]

The Chairman and every member of the House of Chiefs shall take an oath of allegiance.

135. [Staff of House of Chiefs]

There shall be a Clerk of the House of Chiefs and such other staff as may be necessary for carrying out the functions under this PArticle

136. [President may make regulations]

Subject to the provisions of this Constitution, the President may by statutory instrument, make regulations for --

- (a) the appointment of the Clerk and other officers of the House of Chiefs;
- (b) provide for the remuneration of the Chairman, the Vice-Chairman and other members of the House;
- (c) the proceedings and conduct of the House of Chiefs;
- (d) the application of any of the privileges and immunities of the National Assembly and its members to the House of Chiefs and its members; and
- (e) such other matters as are necessary or conducive to the better carrying out of the purposes of this Article

PART XIV

MISCELLANEOUS

(As amended by Act No. 18 of 1996)

Article

137. [Resignations]

(1) Any person who is appointed or elected to any office established by this Constitution may resign from that office by writing under his hand addressed to the persons or authority by whom he was appointed or elected:

Provided that in the case of a person who holds office as Speaker or Deputy Speaker of the National Assembly his resignation from that office shall be addressed to the National Assembly, and in the case of an elected or nominated member of the National Assembly his resignation shall be addressed to the Speaker.

(2) The resignation of any person from any office established by this Constitution shall take effect when the writing signifying the resignation is received by the person or authority to whom it is addressed or by any person authorised by that person or authority to receive it.

138. [Reappointment and concurrent appointments]

(1) Where any person has vacated any office established by this Constitution he may, if qualified, again be appointed or elected to hold that office in accordance with the provisions of this Constitution.

(2) Where a power is conferred by this Constitution upon any person to make any appointment to any office, a person may be appointed to that office notwithstanding that some other person may be holding that office, when that other person is on leave of absence pending the relinquishment of the office; and where two or more persons are holding the same office by reason of an appointment made in pursuance of this clause, then for the purposes of any function conferred upon the holder of that office, the person last appointed shall be deemed to be the sole holder of the office.

139. [Interpretation]

(1) In this Constitution, unless the context otherwise requires --

"Act of Parliament" means a law enacted by Parliament;

"Article" means an Article of this Constitution;

"Chief" means a person who is recognised by the President under the provisions of the Chiefs Act or any law amending or replacing that Act as the Litunga of Western Province, a Paramount Chief, Senior Chief, Chief or Sub-Chief or a person who is appointed as Deputy Chief;

"clause" means a clause of the Article in which the word occurs;

"financial year" means the period of twelve months ending on the 31st December in any year or on such other day as may be prescribed by or under an Act of Parliament: Provided that by or under an Act of Parliament prescribing a day other than the 31st December as the terminal day of the financial year the said period of twelve months may be extended or reduced for any one financial year for the purpose of effecting such prescribed change;

"the *Gazette*" means the official *Gazette* of the Government of Zambia;

"High Court" means the High Court established by this Constitution;

"high judicial office" means the office of a judge of a court of unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or in the Republic of Ireland or the office of a court having jurisdiction in appeals from such a court;

"House" means the National Assembly;

"meeting" means all sittings of the National Assembly held during a period beginning when the National Assembly first sits after being summoned at any time and terminating when the National Assembly is adjourned *sine die* or at the conclusion of a session;

"oath" includes affirmation;

"the oath of allegiance" means such oath of allegiance as may be prescribed by law;

"paragraph" means a paragraph of the clause in which the word occurs;

"person" includes any company or association or body of persons, corporate or unincorporate;

"public office" means an office of emolument in the public office;

"public officer" means a person holding or acting in any public office;

"the public service" subject to clauses (2) and (3) shall have the meaning assigned to it by an Act of Parliament;

"session" means the sittings of the National Assembly beginning when it first sits after the coming into operation of this Constitution or after Parliament is prorogued or dissolved at any time and ending when Parliament is prorogued or is dissolved without having been prorogued;

"sitting" means a period during which the National Assembly is sitting without adjournment and includes any period during which it is in committee;

"statutory instrument" means any proclamation, regulation, order, rule, notice or other instrument, (not being an Act of Parliament) of a legislative as distinct from an executive character;

"Supreme Court" means the Supreme Court of Zambia established by this Constitution.

(2) In this Constitution, references to offices in the public service shall be construed as including references to the offices of judges of the Supreme Court and of the High Court, and to the offices of Chairman, Deputy Chairman, and members of the Industrial Relations Court.

(3) In this Constitution references to an office in the public service shall not be construed as including references to the offices of the Attorney-General, or a member of any Commission established by this Constitution or by an Act of Parliament or to the office of the Clerk of the National Assembly or any office in the department of the Clerk of the National Assembly.

(4) For the purposes of this Constitution, a person shall not be considered as holding a public office by reason only of the fact he is in receipt of a pension or other like allowance in respect of service under the Government of Zambia or of its predecessor Government.

(5) A person shall not be regarded as disqualified for appointment to any office to which a public officer is not qualified to be appointed by reason only that he holds a public office if he is on leave of absence pending relinquishment of that office.

(6) In this Constitution, unless the context otherwise requires, a reference to the holder of an office by the term designating his office shall be construed as including a reference to any person for the time being lawfully acting in or performing the functions of that office: Provided that nothing in this clause shall apply to references to the President or Vice-President in Articles 36, 37, 39, and 45.

(7) References in this Constitution to the power to remove a public officer from his office shall be construed as including references to any power conferred by any law to require or permit that officer to retire from the public service: Provided that nothing in this clause shall be construed as conferring on any person or authority power to require a judge of the Supreme Court or of the High Court, the Investigator-General, the Auditor-General or the Director of Public Prosecutions to retire from the public service.

(8) Any provision in this Constitution that vests in any person or authority power to remove any public officer from his office shall be without prejudice to the power of any person or authority to abolish any office or to any law providing for the compulsory retirement of public officers generally or any class of public officers on attaining an age specified therein.

(9) Where power is vested by this Constitution in any person or authority to appoint any person to act in or perform the functions of any office if the holder thereof is himself unable to perform those functions, no such appointment shall be called in question on the ground that the holder of the office was not unable to perform those functions.

(10) No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions under this Constitution shall be construed as precluding a court of law from exercising jurisdiction in relation to any question whether that person or authority has performed those functions in accordance with this Constitution or any other law.

(11) When any power is conferred by this Constitution to make any Proclamation, statutory instrument, order, regulation or rule, or to issue any direction or certificate or confer recognition, the power shall be construed as including the power, exercisable in like manner, to amend or revoke any such Proclamation, statutory instrument, order, regulation, rule, direction or certificate or to withdraw any such recognition: Provided that nothing in this clause shall apply to the power to issue a certificate conferred by clause (2) of Article 36.

(12)

(a) Any reference in this Constitution to a law that amends or replaces any other law shall be construed as including a reference to a law that modifies, re-enacts with or without amendment or modification, or makes different provision in lieu of that other law.

(b) Where any Act passed after the commencement of this Constitution repeals and re-enacts, with or without modification, any provisions thereof, references in this Constitution to the provisions so repealed shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted.

(c) Where any Act passed after the commencement of this Constitution repeals any provision thereof then, unless the contrary intention appears, the repeal shall not --

(i) revive anything not in force or existing at the time at which the repeal takes effect; or

(ii) affect the previous operation of any provision so repealed or anything duly done or suffered under any provision so repealed; or

(iii) affect any right, privilege, obligation or liability acquired, accrued or incurred under any provision so repealed; or

(iv) affect any penalty, forfeiture or confiscation or punishment incurred under any provision so repealed; or

(v) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or confiscation or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or confiscation or punishment may be imposed, as if the repealing Act had not been passed.

(13) In this Constitution, unless the context otherwise requires, words and expressions importing the masculine gender include females.

(14) In this Constitution, unless the context otherwise requires, words and expressions in the singular include the plural and words and expressions in the plural include the singular.

(15) Where this Constitution confers any power or imposes any duty, the power may be exercised and the duty shall be performed from time to time as occasion requires.

(16) Where by any Act which repeals and re-enacts, with or without modification, any provision of this Constitution, and which is not to come into force immediately on the publication thereof, there is conferred --

(a) a power to make or a power exercisable by making statutory instruments; or

(b) a power to make appointments; or

(c) a power to do any other thing for the purposes of the provision in question;

that power may be exercised at any time on or after the date of publication of the Act in the *Gazette*:

Provided that no instrument, appointment or thing made or done under that power shall, unless it is necessary to bring the Act into force, have any effect until the commencement of the Act.

(17) In computing time for the purposes of any provision of this Constitution, unless a contrary intention is expressed --

- (a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;
- (b) if the last day of the period is Sunday or a public holiday which days are in this clause referred to as "excluded days" the period shall include the next following day, not being an excluded day;
- (c) where any act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day the act or proceeding shall be considered as done or taken in due time if it is done or taken the next day afterwards, not being an excluded day;
- (d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.

CONSTITUTION DE LA REPUBLIQUE DU BENIN

LOI No 90-32 DU 11 DECEMBRE 1990 PORTANT CONSTITUTION DE LA REPUBLIQUE DU Bénin

LE HAUT CONSEIL DE LA REPUBLIQUE, conformément à la Loi Constitutionnelle du 13 août 1990, a proposé, LE PEUPLE BENINOIS a adopté au Référendum Constituant du 2 décembre 1990, LE PRESIDENT DE LA REPUBLIQUE promulgue la Constitution dont la teneur suit:

PREAMBULE

Le Dahomey, proclamé République le 4 décembre 1958, a accédé à la souveraineté internationale le 1er août 1960. Devenu République Populaire du Bénin le 30 novembre 1975, puis République du Bénin le 1er mars 1990, il a connu une évolution constitutionnelle et politique mouvementée depuis son accession à l'indépendance. Seule est restée pérenne l'option en faveur de la République. Les changements successifs de régimes politiques et de gouvernements n'ont pas émoussé la détermination du Peuple Béninois à rechercher dans son génie propre, les valeurs de civilisation culturelles, philosophiques et spirituelles qui animent les formes de son patriotisme.

Ainsi, la Conférence des Forces Vives de la Nation tenue à Cotonou, du 19 au 28 février 1990, en redonnant confiance au peuple, a permis la réconciliation nationale et l'avènement d'une ère de Renouveau Démocratique. Au lendemain de cette Conférence, NOUS, PEUPLE BENINOIS,

- Réaffirmons notre opposition fondamentale à tout régime politique fondé sur l'arbitraire, la dictature, l'injustice, la corruption, la concussion, le régionalisme, le népotisme, la confiscation du pouvoir et le pouvoir personnel;
- Exprimons notre ferme volonté de défendre et de sauvegarder notre dignité aux yeux du monde et de retrouver la place et le rôle de pionnier de la démocratie et de la défense des droits de l'homme qui furent naguère les nôtres;
- Affirmons solennellement notre détermination par la présente Constitution de créer un Etat de droit et de démocratie pluraliste, dans lequel les droits fondamentaux de l'homme, les libertés publiques, la dignité de la personne humaine et la justice sont garantis, protégés et promus comme la condition nécessaire au développement véritable et harmonieux de chaque Béninois tant dans sa dimension temporelle, culturelle que spirituelle;
- Réaffirmons notre attachement aux principes de la démocratie et des Droits de l'Homme tels qu'ils ont été définis par la Charte des Nations-Unies de 1945 et la Déclaration Universelle

des Droits de l'Homme de 1948, à la Charte Africaine des Droits de l'Homme et des Peuples adoptée en 1981 par l'Organisation de l'Unité Africaine, ratifiée par le Bénin le 20 janvier 1986 et dont les dispositions font partie intégrante de la présente Constitution et du droit béninois et ont une valeur supérieure à la loi interne;

- Affirmons notre volonté de coopérer dans la paix et l'amitié avec tous les peuples qui partagent nos idéaux de liberté, de justice, de solidarité humaine, sur la base des principes d'égalité, d'intérêt réciproque et de respect mutuel de la souveraineté nationale et de l'intégrité territoriale;

- Proclamons notre attachement à la cause de l'Unité Africaine et nous engageons à tout mettre en oeuvre pour réaliser l'intégration sous-régionale et régionale;

- Adoptons solennellement la présente Constitution qui est la Loi Suprême de l'Etat et à laquelle nous jurons loyalisme, fidélité et respect.

TITRE IER : DE L' ETAT ET DE LA SOUVERAINETE.

Article 1

L'Etat du Bénin est une République indépendante et souveraine.

- La Capitale de la République du Bénin est PORTO-NOVO.

- L'Emblème national est le drapeau tricolore vert, jaune et rouge. En partant de la hampe, une bande verte sur toute la hauteur et sur les deux cinquièmes de sa longueur, deux bandes horizontales égales:

la supérieure jaune, l'inférieure rouge.

- L'Hymne de la République est "L'AUBE NOUVELLE".

- La Devise de la République est "FRATERNITE-JUSTICE-TRAVAIL".

- La langue officielle est le Français.

- Le Sceau de l'Etat, constitué par un disque de cent vingt millimètres de diamètre, représente:

- à l'avant une pirogue chargée de six étoiles à cinq rais voguant sur des ondes, accompagnée au chef d'un arc avec une flèche en palme soutenu de deux récades en sautoir et, dans le bas, d'une banderole portant la devise "FRATERNITE-JUSTICE-TRAVAIL" avec, à l'entour, l'inscription "République du Bénin";

- et au revers un écu coupé au premier de sinople, au deuxième parti d'or et de gueules, qui sont les trois couleurs du drapeau, l'écu entouré de deux palmes au naturel les tiges passées en sautoir.

- Les armes du Bénin sont:

Ecartelé au premier quartier d'un chfteau Somba d'or;

Au deuxième d'argent à l'Etoile du Bénin au naturel c'est-à-dire une croix à huit pointes d'azur anglées de rayons d'argent et de sable en abîme;

Au troisième d'argent palmier de sinople chargé d'un fruit de gueule;

Au quatrième d'argent au navire de sable voguant sur une mer d'azur avec en brochant sur la ligne de l'écartelé un losange de gueule;

- Supports:

deux panthères d'or tachetées;

- Timbre:

deux cornes d'abondance de sable d'où sortent des épis de maïs;

- Devises:

Fraternité-Justice-Travail en caractère de sable sur une banderole.

Article 2

La République du Bénin est une et indivisible, laïque et démocratique. Son principe est: le Gouvernement du Peuple, par le Peuple et pour le Peuple.

Article 3

La souveraineté nationale appartient au Peuple. Aucune fraction du Peuple, aucune communauté, aucune corporation, aucun parti ou association politique, aucune organisation syndicale ni aucun individu ne peut s'en attribuer l'exercice. La souveraineté s'exerce conformément à la présente Constitution qui est la Loi Suprême de l'Etat. Toute loi, tout texte réglementaire et tout acte administratif contraires à ces dispositions sont nuls et non avenue. En conséquence, tout citoyen a le droit de se pourvoir devant la Cour Constitutionnelle contre les lois, textes et actes présumés inconstitutionnels.

Article 4

Le Peuple exerce sa souveraineté par ses représentants élus et par voie de référendum. Les conditions de recours au référendum sont déterminées par la présente Constitution et par une loi organique. La Cour Constitutionnelle veille à la régularité du référendum et en proclame les résultats.

Article 5

Les Partis politiques concourent à l'expression du suffrage. Ils se forment et exercent librement leurs activités dans les conditions déterminées par la Charte des Partis politiques. Ils doivent respecter les principes de la souveraineté nationale, de la démocratie, de l'intégrité territoriale et la laïcité de l'Etat.

Article 6

Le suffrage est universel, égal et secret. Sont électeurs, dans les conditions déterminées par la loi, tous les nationaux béninois des deux sexes âgés de dix-huit ans révolus et jouissant de leurs droits civils et politiques.

TITRE II : DES DROITS ET DES DEVOIRS DE LA PERSONNE HUMAINE.

Article 7

Les droits et les devoirs proclamés et garantis par la Charte Africaine des Droits de l'Homme et des Peuples adoptée en 1981 par l'Organisation de l'Unité Africaine et ratifiée par le Bénin le 20 janvier 1986 font partie intégrante de la présente Constitution et du Droit béninois.

Article 8

La personne humaine est sacrée et inviolable. L'Etat a l'obligation absolue de la respecter et de la protéger. Il lui garantit un plein épanouissement. A cet effet, il assure à ces citoyens l'égal accès à la santé, à l'éducation, à la culture, à l'information, à la formation professionnelle et à l'emploi.

Article 9

Tout être humain a droit au développement et au plein épanouissement de sa personne dans ses dimensions matérielle, temporelle, intellectuelle et spirituelle, pourvu qu'il ne viole pas les droits d'autrui ni n'enfreigne l'ordre constitutionnel et les bonnes moeurs.

Article 10

Toute personne a droit à la culture. L'Etat a le devoir de sauvegarder et de promouvoir les valeurs nationales de civilisation tant matérielles que spirituelles, ainsi que les traditions culturelles.

Article 11

Toutes les communautés composant la Nation béninoise jouissent de la liberté d'utiliser leurs langues parlées et écrites et de développer leur propre culture tout en respectant celles des autres. L'Etat doit promouvoir le développement de langues nationales d'intercommunication.

Article 12

L'Etat et les collectivités publiques garantissent l'éducation des enfants et créent les conditions favorables à cette fin.

Article 13

L'Etat pourvoit à l'éducation de la jeunesse par des écoles publiques. L'enseignement primaire est obligatoire. L'Etat assure progressivement la gratuité de l'enseignement public.

Article 14

Les institutions et les communautés religieuses peuvent également concourir à l'éducation de la jeunesse. Les écoles privées, laïques ou confessionnelles, peuvent être ouvertes avec l'autorisation et le contrôle de l'Etat. Les écoles privées peuvent bénéficier des subventions de l'Etat dans les conditions déterminées par la loi.

Article 15

Tout individu a droit à la vie, à la liberté, à la sécurité et à l'intégrité de sa personne.

Article 16

Nul ne peut être arrêté ou inculpé qu'en vertu d'une loi promulguée antérieurement aux faits qui lui sont reprochés. Aucun citoyen ne peut être contraint à l'exil.

Article 17

Toute personne accusée d'un acte délictueux est présumée innocente jusqu'à ce que sa culpabilité ait été légalement établie au cours d'un procès public durant lequel toutes les garanties nécessaires à sa libre défense lui auront été assurées. Nul ne sera condamné pour des actions ou omissions qui, au moment où elles ont été commises, ne constituaient pas une infraction d'après le droit national. De même, il ne peut être infligé de peine plus forte que celle qui était applicable au moment où l'infraction a été commise.

Article 18

Nul ne sera soumis à la torture, ni à des sévices ou traitements cruels, inhumains ou dégradants. Nul n'a le droit d'empêcher un détenu ou un prévenu de se faire examiner par un médecin de son choix. Nul ne peut être détenu dans un établissement pénitentiaire s'il ne tombe sous le coup d'une loi pénale en vigueur. Nul ne peut être détenu pendant une durée supérieure à quarante-huit heures que par la décision d'un magistrat auquel il doit être présenté. Ce délai ne peut être prolongé que dans des cas exceptionnellement prévus par la loi et qui ne peut excéder une période supérieure à huit jours.

Article 19

Tout individu, tout agent de l'Etat qui se rendrait coupable d'acte de torture, de sévices ou traitements cruels, inhumains ou dégradants dans l'exercice ou à l'occasion de l'exercice de ses fonctions, soit de sa propre initiative, soit sur instruction, sera puni conformément à la loi. Tout individu, tout agent de l'Etat est délié du devoir d'obéissance lorsque l'ordre reçu constitue une atteinte grave et manifeste au respect des droits de l'homme et des libertés publiques.

Article 20

Le domicile est inviolable. Il ne peut y être effectué de visites domiciliaires ou de perquisitions que dans les formes et conditions prévues par la loi.

Article 21

Le secret de la correspondance et des communications est garanti par la loi.

Article 22

Toute personne a droit à la propriété. Nul ne peut être privé de sa propriété que pour cause d'utilité publique et contre juste et préalable dédommagement.

Article 23

Toute personne a droit à la liberté de pensée, de conscience, de religion, de culte, d'opinion et d'expression dans le respect de l'ordre public établi par la loi et les règlements. L'exercice du culte et l'expression des croyances s'effectuent dans le respect de la laïcité de l'Etat. Les institutions, les communautés religieuses ou philosophiques ont le droit de se développer sans entraves. Elles ne sont pas soumises à la tutelle de l'Etat. Elles règlent et administrent leurs affaires d'une manière autonome.

Article 24

La liberté de la presse est reconnue et garantie par l'Etat. Elle est protégée par la Haute Autorité de l'Audio-Visuel et de la Communication dans les conditions fixées par une loi organique.

Article 25

L'Etat reconnaît et garantit, dans les conditions fixées par la loi, la liberté d'aller et venir, la liberté d'association, de réunion, de cortège et de manifestation.

Article 26

L'Etat assure à tous l'égalité devant la loi sans distinction d'origine, de race, de sexe, de religion, d'opinion politique ou de position sociale. L'homme et la femme sont égaux en droit. L'Etat protège la famille et particulièrement la mère et l'enfant. Il veille sur les handicapés et les personnes âgées.

Article 27

Toute personne a droit à un environnement sain, satisfaisant et durable et a le devoir de le défendre. L'Etat veille à la protection de l'environnement.

Article 28

Le stockage, la manipulation et l'évacuation des déchets toxiques ou polluants provenant des usines et autres, unités industrielles ou artisanales installées sur le territoire national sont réglementés par la loi.

Article 29

Le transit, l'importation, le stockage, l'enfouissement, le déversement sur le territoire national des déchets toxiques ou polluants étrangers et tout accord y relatif constituent un crime contre la Nation. Les sanctions applicables sont définies par la loi.

Article 30

L'Etat reconnaît à tous les citoyens le droit au travail et s'efforce de créer les conditions qui rendent la jouissance de ce droit effective et garantissent au travailleur la juste rétribution de ses services ou de sa production.

Article 31

L'Etat reconnaît et garantit le droit de grève. Tout travailleur peut défendre, dans les conditions prévues par la loi, ses droits et ses intérêts soit individuellement, soit collectivement ou par l'action syndicale. Le droit de grève s'exerce dans les conditions définies par la loi.

Article 32

La défense de la Nation et de l'intégrité du territoire de la République est un devoir sacré pour tout citoyen béninois. Le service militaire est obligatoire. Les conditions d'accomplissement de ce devoir sont déterminées par la loi.

Article 33

Tous les citoyens de la République du Bénin ont le devoir de travailler pour le bien commun, de remplir toutes leurs obligations civiques et professionnelles, de s'acquitter de leurs contributions fiscales.

Article 34

Tout citoyen béninois, civil ou militaire, a le devoir sacré de respecter, en toutes circonstances, la Constitution et l'ordre constitutionnel établi ainsi que les lois et règlements de la République.

Article 35

Les citoyens chargés d'une fonction publique ou élus à une fonction politique ont le devoir de l'accomplir avec conscience, compétence, probité, dévouement et loyauté dans l'intérêt et le respect du bien commun.

Article 36

Chaque Béninois a le devoir de respecter et de considérer son semblable sans discrimination aucune et d'entretenir avec les autres des relations qui permettent de sauvegarder, de renforcer et de promouvoir le respect, le dialogue et la tolérance réciproque en vue de la paix et de la cohésion nationale.

Article 37

Les biens publics sont sacrés et inviolables. Tout citoyen béninois doit les respecter scrupuleusement et les protéger. Tout acte de sabotage, de vandalisme, de corruption, de détournement, de dilapidation ou d'enrichissement illicite est réprimé dans les conditions prévues par la loi.

Article 38

L'Etat protège à l'étranger les droits et intérêts légitimes des citoyens béninois.

Article 39

Les étrangers bénéficient sur le territoire de la République du Bénin des mêmes droits et libertés que les citoyens béninois et ce, dans les conditions déterminées par la loi. Ils sont tenus de se conformer à la Constitution, aux lois et aux règlements de la République.

Article 40

L'Etat a le devoir d'assurer la diffusion et l'enseignement de la Constitution, de la Déclaration Universelle des Droits de l'Homme de 1948, de la Charte Africaine des Droits de l'Homme et des Peuples de 1981 ainsi que de tous les instruments internationaux dûment ratifiés et relatifs aux Droits de l'Homme. L'Etat doit intégrer les droits de la personne humaine dans les programmes d'alphabétisation et d'enseignement aux différents cycles scolaires et universitaires et dans tous les programmes de formation des Forces Armées, des Forces de Sécurité Publique et Assimilés. L'Etat doit également assurer dans les langues nationales par tous les moyens de communication de masse, en particulier par la radiodiffusion et la télévision, la diffusion et l'enseignement de ces mêmes droits.

TITRE III : DU POUVOIR EXECUTIF.

Article 41

Le Président de la République est le Chef de l'Etat. Il est l'élu de la Nation et incarne l'unité nationale. Il est le garant de l'indépendance nationale, de l'intégrité territoriale et du respect de la Constitution, des traités et accords internationaux.

Article 42

Le Président de la République est élu au suffrage universel direct pour un mandat de cinq ans, renouvelable une seule fois. En aucun cas, nul ne peut exercer plus de deux mandats présidentiels.

Article 43

L'élection du Président de la République a lieu au scrutin uninominal majoritaire à deux tours.

Article 44

Nul ne peut être candidat aux fonctions de Président de la République s'il:

- n'est de nationalité béninoise de naissance ou acquise depuis au moins dix ans;
- n'est de bonne moralité et d'une grande probité;
- ne jouit de tous ses droits civils et politiques;
- n'est âgé de 40 ans au moins et 70 ans au plus à la date de dépôt de sa candidature;
- ne réside sur le territoire de la République du Bénin au moment des élections;
- ne jouit d'un état complet de bien-être physique et mental dûment constaté par un collège de trois médecins assermentés désignés par la Cour Constitutionnelle.

Article 45

Le Président de la République est élu à la majorité absolue des suffrages exprimés. Si celle-ci n'est pas obtenue au premier tour de scrutin, il est procédé, dans un délai de quinze jours, à un second tour. Seuls peuvent se présenter au second tour de scrutin les deux candidats qui ont recueilli le plus grand nombre de suffrages au premier tour. En cas de désistement de l'un ou l'autre des deux candidats, les suivants se présentent dans l'ordre de leur classement après le premier scrutin. Est déclaré élu au second tour le candidat ayant recueilli la majorité relative des suffrages exprimés.

Article 46

La convocation des électeurs est faite par décret pris en Conseil des Ministres.

Article 47

Le premier tour du scrutin de l'élection du Président de la République a lieu trente jours au moins et quarante jours au plus avant la date d'expiration des pouvoirs du Président en exercice. Le mandat du nouveau Président de la République prend effet pour compter de la date d'expiration du mandat de son prédécesseur.

Article 48

La loi fixe les conditions d'éligibilité, de présentation des candidatures, de déroulement du scrutin, de dépouillement et de proclamation des résultats de l'élection du Président de la République. La loi fixe la liste civile du Président de la République et détermine la pension à allouer aux anciens Présidents de la République. Toutefois, pour compter de la promulgation de la présente Constitution, seuls les Présidents de la République constitutionnellement élus pourront bénéficier des dispositions du précédent alinéa.

Article 49

La Cour Constitutionnelle veille à la régularité du scrutin et en constate les résultats. L'élection du Président de la République fait l'objet d'une proclamation provisoire. Si aucune contestation relative à la régularité des opérations électorales n'a été déposée au Greffe de la

Cour par l'un des candidats dans les cinq jours de la proclamation provisoire, la Cour déclare le Président de la République définitivement élu. En cas de contestation, la Cour est tenue de statuer dans les dix jours de la proclamation provisoire; sa décision emporte proclamation définitive ou annulation de l'élection. Si aucune contestation n'a été soulevée dans le délai de cinq jours et si la Cour Constitutionnelle estime que l'élection n'était entachée d'aucune irrégularité de nature à en entraîner l'annulation, elle proclame l'élection du Président de la République dans les quinze jours qui suivent le scrutin. En cas d'annulation, il sera procédé à un nouveau tour de scrutin dans les quinze jours de la décision.

Article 50

En cas de vacance de la Présidence de la République par décès, démission ou empêchement définitif, l'Assemblée Nationale se réunit pour statuer sur le cas à la majorité absolue de ses membres. Le Président de l'Assemblée Nationale saisit la Cour Constitutionnelle qui constate et déclare la vacance de la Présidence de la République. Les fonctions de Président de la République, à l'exception de celles mentionnées aux articles 54 alinéa 3, 58, 60, 101 et 154 sont provisoirement exercées par le Président de l'Assemblée Nationale. L'élection du nouveau Président de la République a lieu trente jours au moins et quarante jours au plus après la déclaration du caractère définitif de la vacance. En cas de mise en accusation du Président de la République devant la Haute Cour de Justice, son intérim est assuré par le Président de la Cour Constitutionnelle qui exerce toutes les fonctions de Président de la République à l'exception de celles mentionnées aux articles 54 alinéa 3, 58, 60, 101 et 154. En cas d'absence du territoire, de maladie et de congé du Président de la République, son intérim est assuré par un membre du Gouvernement qu'il aura désigné et dans la limite des pouvoirs qu'il lui aura délégués.

Article 51

Les fonctions de Président de la République sont incompatibles avec l'exercice de tout autre mandat électif, de tout emploi public, civil ou militaire et de toute autre activité professionnelle.

Article 52

Durant leurs fonctions, le Président de la République et les membres du Gouvernement ne peuvent par eux-mêmes, ni par intermédiaire rien acheter ou prendre en bail qui appartienne au domaine de l'Etat, sans autorisation préalable de la Cour Constitutionnelle dans les conditions fixées par la loi. Ils sont tenus, lors de leur entrée en fonction et à la fin de celle-ci, de faire sur l'honneur une déclaration écrite de tous leurs biens et patrimoine adressée à la Chambre des Comptes de la Cour Suprême. Ils ne peuvent prendre part aux marchés de

fournitures et aux adjudications pour les administrations ou institutions relevant de l'Etat ou soumises à leur contrôle.

Article 53

Avant son entrée en fonction, le Président de la République prête le serment suivant.

"Devant Dieu, les Mfnes des Ancêtres, la Nation et devant le Peuple béninois, seul détenteur de la souveraineté; Nous....., Président de la République, élu conformément aux lois de la République jurons solennellement - de respecter et de défendre la Constitution que le Peuple béninois s'est librement donnée;

- de remplir loyalement les hautes fonctions que la Nation nous a confiées;
- de ne nous laisser guider que par l'intérêt général et le respect des droits de la personne humaine, de consacrer toutes nos forces à la recherche et à la promotion du bien commun, de la paix et de l'unité nationale;
- de préserver l'intégrité du territoire national;
- de nous conduire partout en fidèle et loyal serviteur du peuple. En cas de parjure, que nous subissions les rigueurs de la loi". Le serment est reçu par le Président de la Cour Constitutionnelle devant l'Assemblée Nationale et la Cour suprême.

Article 54

Le Président de la République est le détenteur du pouvoir exécutif. Il est le chef du Gouvernement, et à ce titre, il détermine et conduit la politique de la Nation. Il exerce le pouvoir réglementaire. Il dispose de l'Administration et de la Force Armée. Il est responsable de la Défense Nationale. Il nomme, après avis consultatif du bureau de l'Assemblée Nationale, les membres du Gouvernement; il fixe leurs attributions et met fin à leurs fonctions. Les membres du Gouvernement sont responsables devant lui. Les fonctions de membres du Gouvernement sont incompatibles avec l'exercice de tout mandat parlementaire, de tout emploi public, civil ou militaire et de toute activité professionnelle. Les actes du Président de la République autres que ceux prévus aux articles 60 et 115 sont contresignés par les Ministres chargés de leur exécution.

Article 55

Le Président de la République préside le Conseil des Ministres. Le Conseil des Ministres délibère obligatoirement sur:

- les décisions déterminant la politique générale de l'Etat;
- les projets de loi;
- les ordonnances et les décrets réglementaires.

Article 56

Le Président de la République nomme trois des sept membres de la Cour Constitutionnelle. Après avis du Président de l'Assemblée Nationale, il nomme en Conseil des Ministres: le Président de la Cour Suprême, le Président de la Haute Autorité de l'Audio-Visuel et de la Communication, le Grand Chancelier de l'Ordre National. Il nomme également en Conseil des Ministres:

les membres de la Cour Suprême, les Ambassadeurs, les Envoyés extraordinaires, les Magistrats, les Officiers Généraux, et Supérieurs, les Hauts Fonctionnaires dont la liste est fixée par une loi organique.

Article 57

Le Président de la République a l'initiative des lois concurremment avec les membres de l'Assemblée Nationale. Il assure la promulgation des lois dans les quinze jours qui suivent la transmission qui lui en est faite par le Président de l'Assemblée Nationale. Ce délai est réduit à cinq jours en cas d'urgence déclarée par l'Assemblée Nationale. Il peut, avant l'expiration de ces délais, demander à l'Assemblée Nationale une seconde délibération de la loi ou de certains de ses articles. Cette seconde délibération ne peut être refusée. Si l'Assemblée Nationale est en fin de session, cette seconde délibération a lieu d'office lors de la session ordinaire suivante. Le vote pour cette seconde délibération est acquis à la majorité absolue des membres composant l'Assemblée Nationale. Si après ce dernier vote, le Président de la République refuse de promulguer la loi, la Cour Constitutionnelle, saisie par le Président de l'Assemblée Nationale, déclare la loi exécutoire si elle est conforme à la Constitution. La même procédure de mise à exécution est suivie lorsque à l'expiration du délai de promulgation de quinze jours prévu à l'alinéa 2 du présent article, il n'y a ni promulgation, ni demande de seconde lecture.

Article 58

Le Président de la République, après consultation du Président de l'Assemblée Nationale et du Président de la Cour Constitutionnelle, peut prendre l'initiative du référendum sur toute question relative à la promotion et au renforcement des Droits de l'Homme, à l'intégration sous-régionale ou régionale et à l'organisation des pouvoirs publics.

Article 59

Le Président de la République assure l'exécution des lois et garantit celle des décisions de justice.

Article 60

Le Président de République a le droit de grace. Il exerce ce droit dans les conditions définies par l'article 130.

Article 61

Le Président de la République accrédite les Ambassadeurs et les Envoyés extraordinaires auprès des puissances étrangères; les Ambassadeurs et les Envoyés extraordinaires des puissances étrangères sont accrédités auprès de lui.

Article 62

Le Président de la République est le chef suprême des Armées. Il nomme en conseil des Ministres les membres du Conseil Supérieur de la Défense et préside les réunions dudit Conseil. La composition, l'organisation et le fonctionnement du Conseil Supérieur de la Défense sont fixés par une loi.

Article 63

Le Président de la République peut, outre les fonctions spécialisées de défense de l'intégrité territoriale dévolues à l'Armée, faire concourir celle-ci au développement économique de la Nation et à toutes autres tâches d'intérêt public dans les conditions définies par la loi.

Article 64

Tout membre des Forces Armées ou de Sécurité Publique qui désire être candidat aux fonctions de Président de la République doit au préalable donner sa démission des Forces Armées ou de Sécurité Publique. Dans ce cas, l'intéressé pourra prétendre au bénéfice des droits acquis conformément aux statuts de son corps.

Article 65

Toute tentative de renversement du régime constitutionnel par les personnels des Forces Armées ou de Sécurité Publique sera considérée comme une forfaiture et un crime contre la Nation et l'Etat et sera sanctionnée conformément à la loi.

Article 66

En cas de coup d'Etat, de putsch, d'agression par des mercenaires ou de coup de force quelconque, tout membre d'un organe constitutionnel a le droit et le devoir de faire appel à tous les moyens pour rétablir la légitimité constitutionnelle, y compris le recours aux accords de coopération militaire ou de défense existants. Dans ces circonstances, pour tout Béninois, désobéir et s'organiser pour faire échec à l'autorité illégitime constituent le plus sacré des droits et le plus impératif des devoirs.

Article 67

Le Président de la République ne peut faire appel à des Forces Armées ou de Police étrangères pour intervenir dans un conflit intérieur sauf dans les cas prévus à l'article 66.

Article 68

Lorsque les institutions de la République, l'indépendance de la Nation, l'intégrité du territoire national ou l'exécution des engagements internationaux sont menacées de manière grave et immédiate et que le fonctionnement régulier des pouvoirs publics et constitutionnels est menacé ou interrompu, le Président de la République, après consultation du Président de l'Assemblée Nationale et du Président de la Cour Constitutionnelle, prend en Conseil des Ministres les mesures exceptionnelles exigées par les circonstances sans que les droits des citoyens garantis par la Constitution soient suspendus. Il en informe la Nation par un message. L'Assemblée Nationale se réunit de plein droit en session extraordinaire.

Article 69

Les mesures prises doivent s'inspirer de la volonté d'assurer aux pouvoirs publics et constitutionnels dans les moindres délais, les moyens d'accomplir leur mission. L'Assemblée Nationale fixe le délai au terme duquel le Président de la République ne peut plus prendre des mesures exceptionnelles.

Article 70

Le Président de la République peut déléguer certains de ses pouvoirs aux ministres, sauf ceux prévus aux articles 54 alinéa 3, 60, 61, 101, 115, 133 et 144.

Article 71

Le Président de la République ou tout membre de son Gouvernement peut, dans l'exercice de ses fonctions gouvernementales, être interpellé par l'Assemblée Nationale. Le Président de la République répond à ces interpellations par lui-même ou par l'un de ses ministres qu'il délègue spécialement devant l'Assemblée Nationale. En la circonstance, l'Assemblée Nationale peut prendre une résolution pour faire des recommandations au Gouvernement.

Article 72

Le Président de la République adresse une fois par an un message à l'Assemblée Nationale sur l'état de la Nation. Il peut aussi, à tout moment, adresser des messages à l'Assemblée Nationale. Ces messages ne donnent lieu à aucun débat; ils peuvent toutefois inspirer les travaux de l'Assemblée.

Article 73

La responsabilité personnelle du Président de la République est engagée en cas de haute trahison, d'outrage à l'Assemblée, ou d'atteinte à l'honneur et à la probité.

Article 74

Il y a haute trahison lorsque le Président de la République a violé son serment, est reconnu auteur, co-auteur ou complice de violations graves et caractérisées des Droits de l'Homme, de

cession d'une partie du territoire national ou d'acte attentatoire au maintien d'un environnement sain, satisfaisant, durable et favorable au développement.

Article 75

Il y a atteinte à l'honneur et à la probité notamment lorsque le comportement personnel du Président de la République est contraire aux bonnes moeurs ou qu'il est reconnu auteur, co-auteur ou complice de malversations, de corruption, d'enrichissement illicite.

Article 76

Il y a outrage à l'Assemblée Nationale lorsque, sur des questions posées par l'Assemblée Nationale sur l'activité gouvernementale, le Président de la République ne fournit aucune réponse dans un délai de trente jours.

Article 77

Passé ce délai, le Président de l'Assemblée Nationale saisit la Cour Constitutionnelle de ce manquement grave aux dispositions constitutionnelles. La Cour Constitutionnelle statue dans les trois jours. Le Président de la République est tenu de fournir des réponses à l'Assemblée Nationale dans les plus brefs délais et dans tous les cas avant la fin de la session en cours. A l'expiration de ce délai, si aucune suite n'est donnée par le Président de la République à la décision de la Cour, le Président de la République est déféré devant la Haute Cour de Justice pour outrage à l'Assemblée Nationale.

Article 78

Les faits prévus aux Articles 74 à 77 seront poursuivis et punis selon les dispositions des Articles 136 à 138 de la présente Constitution.

TITRE IV : DU POUVOIR LEGISLATIF.

I : DE L' ASSEMBLEE NATIONALE.

Article 79

Le Parlement est constitué par une Assemblée unique dite Assemblée Nationale dont les membres portent le titre de député. Il exerce le pouvoir législatif et contrôle l'action du Gouvernement.

Article 80

Les députés sont élus au suffrage universel direct. La durée du mandat est de quatre ans. Ils sont rééligibles. Chaque député est le représentant de la Nation toute entière et tout mandat impératif est nul.

Article 81

La loi fixe le nombre des membres de l'Assemblée Nationale, les conditions d'éligibilité, le régime des incompatibilités, les conditions dans lesquelles il est pourvu aux sièges vacants. La Cour Constitutionnelle statue souverainement sur la validité de l'élection des députés. Tout membre des Forces Armées ou de Sécurité Publique qui désire être candidat aux fonctions de député doit au préalable donner sa démission des Forces Armées ou de Sécurité Publique. Dans ce cas, l'intéressé pourra prétendre au bénéfice des droits acquis conformément aux statuts de son corps.

Article 82

L'Assemblée Nationale est dirigée par un Président assisté d'un Bureau. Ils sont élus pour la durée de la législature dans les conditions fixées par le Règlement Intérieur de ladite Assemblée. Lorsqu'il assure l'intérim du Président de la République dans les conditions prévues à l'article 50 de la présente Constitution, le Président de l'Assemblée Nationale est remplacé dans ses fonctions conformément au Règlement Intérieur de l'Assemblée.

Article 83

En cas de vacance de la Présidence de l'Assemblée Nationale par décès, démission ou toute autre cause, l'Assemblée élit un nouveau Président dans les quinze jours qui suivent la vacance, si elle est en session; dans le cas contraire, elle se réunit de plein droit dans les conditions fixées par le Règlement Intérieur. En cas de nécessité, il est pourvu au remplacement des autres membres du Bureau conformément aux dispositions du Règlement Intérieur de ladite Assemblée.

Article 84

Le Président de l'Assemblée Nationale doit rendre compte à l'Assemblée de sa gestion et de ses activités et lui fournir toutes explications qui lui seront demandées. Tout député peut adresser au Président de l'Assemblée des questions écrites ou orales sur ses activités et sa gestion. L'Assemblée Nationale peut constituer une commission d'enquête chargée de lui faire un rapport circonstancié. Aux termes de ce rapport, l'Assemblée Nationale peut demander la démission de son Président à la majorité des deux tiers de ses membres. Si ce quorum est atteint, le Président de l'Assemblée Nationale est automatiquement démis de ses fonctions, tout en conservant son titre de député. L'Assemblée Nationale procède dans un délai de quinze jours à l'élection d'un nouveau Président.

Article 85

Si à l'ouverture d'une session, le quorum de la moitié plus un des membres composant l'Assemblée Nationale n'est pas atteint, la séance est renvoyée au troisième jour qui suit. Les délibérations sont alors valables, quel que soit le quorum.

Article 86

Les séances de l'Assemblée ne sont valables que si elles se déroulent au lieu ordinaire de ses sessions, sauf cas de force majeure dûment constaté par la Cour Constitutionnelle. Le compte rendu intégral des débats de l'Assemblée Nationale est publié au Journal Officiel.

Article 87

L'Assemblée se réunit de plein droit en deux sessions ordinaires par an. La première session s'ouvre dans le cours de la première quinzaine du mois d'avril. La deuxième session s'ouvre dans le cours de la seconde quinzaine du mois d'octobre. Chacune des sessions ne peut excéder trois mois.

Article 88

L'Assemblée Nationale est convoquée en session extraordinaire par son Président, sur un ordre du jour déterminé, à la demande du Président de la République ou à la majorité absolue des députés. La durée d'une session extraordinaire ne peut excéder quinze jours. L'Assemblée Nationale se sépare sitôt l'ordre du jour épuisé.

Article 89

Les travaux de l'Assemblée Nationale ont lieu suivant un Règlement Intérieur qu'elle adopte conformément à la Constitution. Le Règlement Intérieur détermine:

- la composition, les règles de fonctionnement du Bureau ainsi que les pouvoirs et prérogatives de son Président;
- le nombre, le mode de désignation, la composition, le rôle et la compétence de ses commissions permanentes, ainsi que celles qui sont spéciales et temporaires;
- la création de commissions d'enquête parlementaires dans le cadre du contrôle de l'action gouvernementale;
- l'organisation des services administratifs dirigés par un Secrétaire Général Administratif, placé sous l'autorité du Président de l'Assemblée Nationale;
- le régime de discipline des députés au cours des séances de l'Assemblée;
- les différents modes de scrutin, à l'exclusion de ceux prévus expressément par la présente Constitution.

Article 90

Les membres de l'Assemblée Nationale jouissent de l'immunité parlementaire.

En conséquence, aucun député ne peut être poursuivi, recherché, arrêté, détenu ou jugé à l'occasion des opinions ou votes émis par lui dans l'exercice de ses fonctions. Aucun député ne peut, pendant la durée des sessions, être poursuivi ou arrêté en matière criminelle ou correctionnelle qu'avec l'autorisation de l'Assemblée Nationale, sauf les cas de flagrant délit.

Aucun député ne peut, hors session, être arrêté qu'avec l'autorisation du Bureau de l'Assemblée Nationale, sauf les cas de flagrant délit, de poursuites autorisées ou de condamnation définitive. La détention ou la poursuite d'un député est suspendue si l'Assemblée Nationale le requiert par un vote à la majorité des deux tiers.

Article 91

Les députés perçoivent des indemnités parlementaires qui sont fixées par la loi.

Article 92

Tout député nommé à une fonction ministérielle perd d'office son mandat parlementaire.

Les conditions de son remplacement sont fixées par la loi.

Article 93

Le droit de vote des députés est personnel. Le Règlement Intérieur de l'Assemblée Nationale peut autoriser exceptionnellement la délégation de vote. Dans ce cas, nul ne peut recevoir délégation de plus d'un mandat.

II : DES RAPPORTS ENTRE L' ASSEMBLEE : ET LE GOUVERNEMENT.

Article 94

L'Assemblée Nationale informe le Président de la République de l'ordre du jour de ses séances et de celui de ses commissions.

Article 95

Les membres du Gouvernement ont accès aux séances de l'Assemblée Nationale. Il sont entendus à la demande d'un député, d'une commission ou à leur propre demande. Ils peuvent se faire assister par des experts.

Article 96

L'Assemblée Nationale vote la loi et consent l'impôt.

Article 97

La loi est votée par l'Assemblée Nationale à la majorité simple. Cependant, les lois auxquelles la présente Constitution confère le caractère de lois organiques sont votées et modifiées dans les conditions suivantes:

- la proposition ou le projet n'est soumis à la délibération et au vote de l'Assemblée qu'après l'expiration d'un délai de quinze jours après son dépôt sur le Bureau de l'Assemblée;
- le texte ne peut être adopté qu'à la majorité absolue des membres composant l'Assemblée;
- les lois organiques ne peuvent être promulguées qu'après déclaration par la Cour Constitutionnelle de leur conformité à la Constitution.

Article 98

Sont du domaine de la loi les règles concernant:

- la citoyenneté, les droits civiques et les garanties fondamentales accordées aux citoyens pour l'exercice des libertés publiques; les sujétions imposées, dans l'intérêt de la défense nationale et la sécurité publique, aux citoyens en leur personne et en leurs biens;
- la nationalité, l'état et la capacité des personnes, les régimes matrimoniaux, les successions et les libéralités;
- la procédure selon laquelle les coutumes seront constatées et mises en harmonie avec les principes fondamentaux de la Constitution;
- la détermination des crimes et délits ainsi que les peines qui leur sont applicables;
- l'amnistie;
- l'organisation des juridictions de tous ordres et la procédure suivie devant ces juridictions, la création de nouveaux ordres de juridiction, le statut de la magistrature, des offices ministériels et des auxiliaires de justice;
- l'assiette, le taux et les modalités de recouvrement des impositions de toute nature;
- le régime d'émission de la monnaie;
- le régime électoral du Président de la République, des membres de l'Assemblée Nationale et des Assemblées Locales;
- la création des catégories d'établissements publics;
- le Statut Général de la Fonction Publique;
- le Statut des Personnels militaires, des Forces de Sécurité Publique et Assimilés;
- l'organisation générale de l'Administration;
- l'organisation territoriale, la création et la modification de Circonscriptions administratives ainsi que les découpages électoraux;
- l'état de siège et l'état d'urgence;

La loi détermine les principes fondamentaux:

- de l'organisation de la défense nationale;
- de la libre administration des collectivités territoriales, de leurs compétences et de leurs ressources;
- de l'enseignement et de la recherche scientifique;
- du régime de la propriété, des droits réels et des obligations civiles et commerciales;
- des nationalisations et dénationalisations d'entreprises et des transferts de propriété d'entreprises du secteur public au secteur privé;
- du droit du travail, de la sécurité sociale, du droit syndical et du droit de grève;
- de l'aliénation et de la gestion du domaine de l'Etat;
- de la mutualité et de l'épargne;

- de l'organisation de la production;
- de la protection de l'environnement et de la conservation des ressources naturelles;
- du régime des transports et des télécommunications;
- du régime pénitentiaire.

Article 99

Les lois de finances déterminent les recettes et les dépenses de l'Etat. Les lois de règlement contrôlent l'exécution des lois de finances, sous réserve de l'apurement ultérieur des comptes de la Nation par la Chambre des Comptes de la Cour Suprême. Les lois de programme fixent les objectifs de l'action économique et sociale de l'Etat.

Article 100

Les matières autres que celles qui sont du domaine de la loi ont un caractère réglementaire. Les textes de forme législative intervenus en ces matières antérieurement à l'entrée en vigueur de la présente Constitution peuvent être modifiés par décret pris après avis de la Cour Constitutionnelle.

Article 101

La déclaration de guerre est autorisée par l'Assemblée Nationale. Lorsque, à la suite de circonstances exceptionnelles, l'Assemblée Nationale ne peut siéger utilement, la décision de déclaration de guerre est prise en Conseil des Ministres par le Président de la République qui en informe immédiatement la Nation. L'état de siège et l'état d'urgence sont décrétés en Conseil des Ministres, après avis de l'Assemblée Nationale. La prorogation de l'état du siège ou de l'état d'urgence au-delà de quinze jours ne peut être autorisée que par l'Assemblée Nationale. Lorsque l'Assemblée Nationale n'est pas appelée à se prononcer, aucun état de siège ou état d'urgence ne peut être décrété sans son autorisation, dans les soixante jours qui suivent la date de mise en vigueur d'un précédent état de siège ou d'urgence.

Article 102

Le Gouvernement peut, pour l'exécution de son programme, demander à l'Assemblée Nationale de voter une loi l'autorisant à prendre par ordonnance pendant un délai limité des mesures qui sont normalement du domaine de la loi. Cette autorisation ne peut être accordée qu'à la majorité des deux tiers des membres de l'Assemblée Nationale. Les ordonnances sont prises en Conseil des Ministres, après avis de la Cour Constitutionnelle. Elles entrent en vigueur dès leur publication, mais deviennent caduques si le projet de la loi de ratification n'est pas déposé devant l'Assemblée avant la date fixée par la loi d'habilitation. A l'expiration du délai mentionné au premier alinéa du présent article, les ordonnances ne peuvent plus être modifiées que par la loi dans leurs dispositions qui sont du domaine législatif.

Article 103

Les députés ont le droit d'amendement.

Article 104

Les propositions, projets et amendements qui ne sont pas du domaine de la loi sont irrecevables. L'irrecevabilité est prononcée par le Président de l'Assemblée Nationale après délibération du Bureau. S'il apparaît que la proposition ou l'amendement sont contraires à une délégation accordée en vertu de l'article 102 de la présente Constitution, le Gouvernement peut opposer l'irrecevabilité. En cas de contestation sur les alinéas 1 et 3 du présent article, la Cour Constitutionnelle, saisie par le Président de l'Assemblée Nationale ou le Gouvernement, statue dans un délai de huit jours.

Article 105

L'initiative des lois appartient concurremment au Président de la République et aux membres de l'Assemblée Nationale. Les projets de loi sont délibérés en Conseil des Ministres, après avis motivé de la Cour Suprême saisie conformément à l'article 132 de la présente Constitution et déposés sur le Bureau de l'Assemblée Nationale. Les projets et propositions de loi sont envoyés avant délibération en séance plénière, à la commission compétente de l'Assemblée Nationale pour examen. Le projet du budget de l'Assemblée Nationale ne peut être examiné en commission ou en séance plénière sans avoir été au préalable soumis au Bureau de ladite Assemblée.

Article 106

La discussion des projets de loi porte sur le texte présenté par la commission. Celle-ci, à la demande du Gouvernement, doit porter à la connaissance de l'Assemblée Nationale les points sur lesquels il y a désaccord avec le Gouvernement.

Article 107

Les propositions et amendements déposés par les députés ne sont pas recevables lorsque leur adoption aurait pour conséquence soit une diminution des ressources publiques, soit la création ou l'aggravation d'une charge publique, à moins qu'ils ne soient accompagnés d'une proposition d'augmentation de recettes ou d'économies équivalentes.

Article 108

Les députés peuvent, par un vote à la majorité des trois quarts, décider de soumettre toute question au référendum.

Article 109

L'Assemblée Nationale vote le projet de loi de finances dans les conditions déterminées par la loi. L'Assemblée Nationale est saisie du projet de loi de finances au plus tard une semaine

avant l'ouverture de la session d'octobre. Le projet de loi de finances doit prévoir les recettes nécessaires à la couverture intégrale des dépenses.

Article 110

L'Assemblée Nationale vote le budget en équilibre. Si l'Assemblée Nationale ne s'est pas prononcée, à la date du 31 décembre, les dispositions du projet de loi de finances peuvent être mises en vigueur par ordonnance. Le Gouvernement saisit, par ratification, l'Assemblée Nationale convoquée en session extraordinaire dans un délai de quinze jours. Si l'Assemblée Nationale n'a pas voté le budget à la fin de cette session extraordinaire le budget est établi définitivement par ordonnance.

Article 111

Si le projet de loi de finances n'a pu être déposé en temps utile pour être promulgué avant le début de l'exercice, le Président de la République demande d'urgence à l'Assemblée Nationale l'autorisation d'exécuter les recettes et les dépenses de l'Etat par douzièmes provisoires.

Article 112

L'Assemblée Nationale règle les comptes de la Nation selon les modalités prévues par la loi organique de finances. Elle est, à cet effet, assistée de la Chambre des Comptes de la Cour Suprême, qu'elle charge de toutes enquêtes et études se rapportant à l'exécution des recettes et des dépenses publiques, ou à la gestion de la trésorerie nationale, des collectivités territoriales, des administrations ou institutions relevant de l'Etat ou soumises à son contrôle.

Article 113

Le Gouvernement est tenu de fournir à l'Assemblée Nationale toutes explications qui lui seront demandées sur sa gestion et sur ses activités. Les moyens d'information et de contrôle de l'Assemblée Nationale sur l'action gouvernementale sont:

l'interpellation conformément à l'article 71;

la question écrite;

la question orale avec ou sans débat, non suivie de vote;

la commission parlementaire d'enquête. Ces moyens s'exercent dans les conditions déterminées par le Règlement Intérieur de l'Assemblée Nationale.

TITRE V : DE LA COUR CONSTITUTIONNELLE.

Article 114

La Cour Constitutionnelle est la plus haute juridiction de l'Etat en matière constitutionnelle. Elle est juge de la constitutionnalité de la loi et elle garantit les droits fondamentaux de la

personne humaine et les libertés publiques. Elle est l'organe régulateur du fonctionnement des institutions et de l'activité des pouvoirs publics.

Article 115

La Cour Constitutionnelle est composée de sept membres dont quatre sont nommés par le Bureau de l'Assemblée Nationale et trois par le Président de la République pour un mandat de cinq ans renouvelable une seule fois. Aucun membre de la Cour Constitutionnelle ne peut siéger plus de dix ans. Pour être membre de la Cour Constitutionnelle, outre la condition de compétence professionnelle, il faut être de bonne moralité et d'une grande probité. La Cour Constitutionnelle comprend:

trois magistrats ayant une expérience de quinze années au moins dont deux sont nommés par le Bureau de l'Assemblée Nationale et un par le Président de la République;

deux juristes de haut niveau, professeurs ou praticiens de droit, ayant une expérience de quinze années au moins nommés l'un par le Bureau de l'Assemblée Nationale et l'autre par le Président de la République;

deux personnalités de grande réputation professionnelle nommées l'une par le Bureau de l'Assemblée Nationale et l'autre par le Président de la République. Les membres de la Cour Constitutionnelle sont inamovibles pendant la durée de leur mandat. Ils ne peuvent être poursuivis ou arrêtés sans l'autorisation de la Cour Constitutionnelle et du Bureau de la Cour Suprême siégeant en session conjointe sauf les cas de flagrant délit. Dans ces cas, le Président de la Cour Constitutionnelle et le Président de la Cour Suprême doivent être saisis immédiatement et au plus tard dans les quarante-huit heures. Les fonctions de membre de la Cour Constitutionnelle sont incompatibles avec la qualité de membre de Gouvernement, l'exercice de tout mandat électif, de tout emploi public, civil ou militaire, de toute autre activité professionnelle ainsi que de toute fonction de représentation nationale, sauf dans le cas prévu à l'article 50 alinéa 3. Une loi organique détermine l'organisation et le fonctionnement de la Cour Constitutionnelle, la procédure suivie devant elle, notamment les délais pour sa saisine de même que les immunités et le régime disciplinaire de ses membres.

Article 116

Le Président de la Cour Constitutionnelle est élu par ses pairs pour une durée de cinq ans parmi les magistrats et juristes membres de la Cour.

Article 117

La Cour Constitutionnelle - Statue obligatoirement sur:

la constitutionnalité des lois organiques et des lois en général avant leur promulgation;

les Règlements Intérieurs de l'Assemblée Nationale, de la Haute Autorité de l'Audio-Visuel et de la Communication et du Conseil Economique et Social avant leur mise en application, quant à leur conformité à la Constitution;

la constitutionnalité des lois et des actes réglementaires censés porter atteinte aux droits fondamentaux de la personne humaine et aux libertés publiques et en général, sur la violation des droits de la personne humaine;

les conflits d'attributions entre les institutions de l'Etat.

- Veille à la régularité de l'élection du Président de la République; examine les réclamations, statue sur les irrégularités qu'elle aurait pu, par elle-même relever et proclame les résultats du scrutin; statue sur la régularité du référendum et en proclame les résultats;

- Statue, en cas de contestation, sur la régularité des élections législatives;

- Fait de droit partie de la Haute Cour de justice à l'exception de son Président.

Article 118

Elle est également compétente pour statuer sur les cas prévus aux articles 50, 52, 57, 77, 86, 100, 102, 104 et 147.

Article 119

Le Président de la Cour Constitutionnelle est compétent pour:

- recevoir le serment du Président de la République;

- donner son avis au Président de la République dans les cas prévus aux articles 58 et 68;

- assurer l'intérim du Président de la République dans le cas prévu à l'article 50 alinéa 3.

Article 120

La Cour Constitutionnelle doit statuer dans le délai de quinze jours après qu'elle a été saisie d'un texte de loi ou d'une plainte en violation des droits de la personne humaine et des libertés publiques. Toutefois, à la demande du Gouvernement, s'il y a urgence, ce délai est ramené à huit jours. Dans ce cas, la saisine de la Cour Constitutionnelle suspend le délai de promulgation de la loi.

Article 121

La Cour Constitutionnelle, à la demande du Président de la République ou de tout membre de l'Assemblée Nationale, se prononce sur la constitutionnalité des lois avant leur promulgation.

Elle se prononce d'office sur la constitutionnalité des lois et de tout texte réglementaire censés porter atteinte aux droits fondamentaux de la personne humaine et aux libertés publiques. Elle statue plus généralement sur les violations des droits de la personne humaine et sa décision doit intervenir dans un délai de huit jours.

Article 122

Tout citoyen peut saisir la Cour Constitutionnelle sur la constitutionnalité des lois, soit directement, soit par la procédure de l'exception d'inconstitutionnalité invoquée dans une affaire qui le concerne devant une juridiction. Celle-ci doit surseoir jusqu'à la décision de la Cour Constitutionnelle qui doit intervenir dans un délai de trente jours.

Article 123

Les lois organiques avant leur promulgation, les Règlements Intérieurs de l'Assemblée Nationale, de la Haute Autorité de l'Audio-Visuel et de la Communication et du Conseil Economique et Social avant leur mise en application, doivent être soumis à la Cour Constitutionnelle qui se prononce sur leur conformité à la Constitution.

Article 124

Une disposition déclarée inconstitutionnelle ne peut être promulguée ni mise en application. Les décisions de la Cour Constitutionnelle se sont susceptibles d'aucun recours. Elles s'imposent aux pouvoirs publics et à toutes les autorités civiles, militaires et juridictionnelles.

TITRE VI: DU POUVOIR JUDICIAIRE.

Article 125

Le Pouvoir Judiciaire est indépendant du Pouvoir législatif et du Pouvoir Exécutif. Il est exercé par la Cour Suprême, les Cours et Tribunaux créés conformément à la présente Constitution.

Article 126

La justice est rendue au nom du Peuple Béninois. Les juges ne sont soumis, dans l'exercice de leurs fonctions, qu'à l'autorité de la loi. Les magistrats du siège sont inamovibles.

Article 127

Le Président de la République est garant de l'indépendance de la justice. Il est assisté par le Conseil Supérieur de la Magistrature.

Article 128

Le Conseil Supérieur de la Magistrature statue comme Conseil de discipline des magistrats. La composition, les attributions, l'organisation et le fonctionnement du Conseil Supérieur de la Magistrature sont fixés par une loi organique.

Article 129

Les magistrats sont nommés par le Président de la République, sur proposition du Garde des Sceaux, Ministre de la Justice, après avis du Conseil Supérieur de la Magistrature.

Article 130

Le Conseil Supérieur de la Magistrature étudie les dossiers de grfce et les transmet avec son avis motivé au Président de la République.

I : DE LA COUR SUPREME.

Article 131

La Cour Suprême est la plus haute juridiction de l'Etat en matière administrative, judiciaire et des comptes de l'Etat. Elle est également compétente en ce qui concerne le contentieux des élections locales. Les décisions de la Cour Suprême ne sont susceptibles d'aucun recours. Elles s'imposent au Pouvoir Exécutif, au Pouvoir Législatif, ainsi qu'à toutes les juridictions.

Article 132

La Cour Suprême est consultée par le Gouvernement plus généralement sur toutes les matières administratives et juridictionnelles. Elle peut, à la demande du Chef de l'Etat, être chargée de la rédaction et de la modification de tous les textes législatifs et réglementaires, préalablement à leur examen par l'Assemblée Nationale.

Article 133

Le Président de la Cour Suprême est nommé pour une durée de cinq ans par le Président de la République, après avis du Président de l'Assemblée Nationale, parmi les magistrats et les juristes de haut niveau, ayant quinze ans au moins d'expérience professionnelle par décret pris en Conseil des Ministres. Il est inamovible pendant la durée de son mandat qui n'est renouvelable qu'une seule fois. Les fonctions du Président de la Cour Suprême sont incompatibles avec la qualité de membre de Gouvernement, l'exercice de tout mandat électif, de tout emploi public, civil ou militaire, de toute autre activité professionnelle ainsi que de toute fonction de représentation nationale.

Article 134

Les Présidents de Chambre et les Conseillers sont nommés parmi les magistrats et les juristes de haut niveau, ayant quinze ans au moins d'expérience professionnelle, par décret pris en Conseil des Ministres par le Président de la République, sur proposition du Président de la Cour Suprême et après avis du Conseil Supérieur de la Magistrature. La loi détermine le Statut des magistrats de la Cour Suprême.

II : DE LA HAUTE COUR DE JUSTICE.

Article 135

La Haute Cour de Justice est composée des membres de la Cour Constitutionnelle, à l'exception de son Président, de six députés élus par l'Assemblée Nationale et du Président de la Cour Suprême. La Haute Cour élit en son sein son Président. Une loi organique fixe les règles de son fonctionnement ainsi que la procédure suivie devant elle.

Article 136

La Haute Cour de Justice est compétente pour juger le Président de la République et les membres du Gouvernement à raison de faits qualifiés de haute trahison, d'infractions commises dans l'exercice ou à l'occasion de l'exercice de leurs fonctions, ainsi que pour juger leurs complices en cas de complot contre la sûreté de l'Etat. Les juridictions de droit commun restent compétentes pour les infractions perpétrées en dehors de l'exercice de leurs fonctions et dont ils sont pénalement responsables.

Article 137

La Haute Cour de Justice est liée par la définition des infractions et par la détermination des sanctions résultant des lois pénales en vigueur à l'époque des faits. La décision de poursuite puis la mise en accusation du Président de la République et des membres du Gouvernement est votée à la majorité des deux tiers des députés composant l'Assemblée Nationale, selon la procédure prévue par le Règlement Intérieur de l'Assemblée Nationale. L'instruction est menée par les magistrats de la Chambre d'Accusation de la Cour d'Appel ayant juridiction sur le lieu du siège de l'Assemblée Nationale.

Article 138

Le Président de la République et les membres du Gouvernement sont suspendus de leurs fonctions en cas de mise en accusation pour haute trahison, outrage à l'Assemblée Nationale et toute atteinte à l'honneur et à la probité. En cas de condamnation, ils sont déchus de leurs charges.

TITRE VII : DU CONSEIL ECONOMIQUE ET SOCIAL.

Article 139

Le Conseil Economique et Social donne son avis sur les projets de loi, d'ordonnance ou de décret ainsi que sur les propositions de loi qui lui sont soumis. Les projets de loi de programme à caractère économique et social lui sont obligatoirement soumis pour avis. Le Président de la République peut consulter le Conseil Economique et Social sur tout problème à caractère économique, social, culturel, scientifique et technique. Le Conseil Economique et Social peut, de sa propre initiative, sous forme de recommandation, attirer l'attention de l'Assemblée Nationale et du Gouvernement sur les réformes d'ordre économique et social qui

lui paraissent conformes ou contraires à l'intérêt général. Sur la demande du Gouvernement, le Conseil Economique et Social désigne un de ses membres pour exposer devant les Commissions de l'Assemblée Nationale l'avis du Conseil sur les projets ou propositions de lois qui lui ont été soumis.

Article 140

Le Conseil Economique et Social élit en son sein son Président et les membres de son Bureau. La composition, l'organisation et le fonctionnement du Conseil Economique et Social sont fixés par une loi organique.

Article 141

Les membres du Conseil Economique et Social perçoivent des indemnités de session et de déplacement. Le montant de ces indemnités est fixé par décret pris en Conseil des Ministres.

TITRE VIII : DE LA HAUTE AUTORITE DE L' AUDIO-VISUEL ET DE LA COMMUNICATION.

Article 142

La Haute Autorité de l'Audio-Visuel et de la Communication a pour mission de garantir et d'assurer la liberté et la protection de la presse, ainsi que de tous les moyens de communication de masse dans le respect de la loi. Elle veille au respect de la déontologie en matière d'information et à l'accès équitable des partis politiques, des associations et des citoyens aux moyens officiels d'information et de communication.

Article 143

Le Président de la Haute Autorité de l'Audio-Visuel et de la Communication est nommé, après consultation du Président de l'Assemblée Nationale, par décret pris en Conseil des Ministres. La composition, les attributions, l'organisation et le fonctionnement de la Haute Autorité de l'Audio-Visuel et de la Communication sont fixés par une loi organique.

TITRE IX : DES TRAITES ET ACCORDS INTERNATIONAUX.

Article 144

Le Président de la République négocie et ratifie les traités et accords internationaux.

Article 145

Les traités de paix, les traités ou accords relatifs à l'organisation internationale, ceux qui engagent les finances de l'Etat, ceux qui modifient les lois internes de l'Etat, ceux qui comportent cession, échange ou adjonction de territoire, ne peuvent être ratifiés qu'en vertu

d'une loi. Nulle cession, nul échange, nulle adjonction de territoire n'est valable sans le consentement des populations intéressées.

Article 146

Si la Cour Constitutionnelle saisie par le Président de la République ou par le Président de l'Assemblée Nationale a déclaré qu'un engagement international comporte une clause contraire à la Constitution, l'autorisation de la ratifier ne peut intervenir qu'après la révision de la Constitution.

Article 147

Les traités ou accords régulièrement ratifiés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve pour chaque accord ou traité, de son application par l'autre partie.

Article 148

La République du Bénin peut conclure avec d'autres Etats des accords de coopération ou d'association sur la base des principes d'égalité, de respect mutuel de la souveraineté, des avantages réciproques et de la dignité nationale.

Article 149

La République du Bénin, soucieuse de réaliser l'Unité Africaine, peut conclure tout accord d'intégration sous-régionale ou régionale conformément à l'article 145.

TITRE X : DES COLLECTIVITES TERRITORIALES.

Article 150

Les collectivités territoriales de la République sont créées par la loi.

Article 151

Ces collectivités s'administrent librement par des conseils élus et dans les conditions prévues par la loi.

Article 152

Aucune dépense de souveraineté de l'Etat ne saurait être imputée à leur budget.

Article 153

L'Etat veille au développement harmonieux de toutes les collectivités territoriales sur la base de la solidarité nationale, des potentialités régionales et de l'équilibre inter-régional.

TITRE XI : DE LA REVISION.

Article 154

L'initiative de la Révision de la Constitution appartient concurremment au Président de la République, après décision prise en Conseil des Ministres et aux membres de l'Assemblée Nationale. Pour être pris en considération, le projet ou la proposition de révision doit être voté à la majorité des trois quarts des membres composant l'Assemblée Nationale.

Article 155

La révision n'est acquise qu'après avoir été approuvée par référendum, sauf si le projet ou la proposition en cause a été approuvé à la majorité des quatre cinquièmes des membres composant l'Assemblée Nationale.

Article 156

Aucune procédure de révision ne peut être engagée ou poursuivie lorsqu'il est porté atteinte à l'intégrité du territoire. La forme républicaine et la laïcité de l'Etat ne peuvent faire l'objet d'une révision.

TITRE XII : DISPOSITIONS TRANSITOIRES ET FINALES.

Article 157

La présente Constitution devra être promulguée dans les huit jours après son adoption au référendum. Le Président de la République devra entrer en fonction, l'Assemblée devra se réunir au plus tard le 1er avril 1991.

Le Haut Conseil de la République et le Gouvernement de transition continueront d'exercer leurs fonctions jusqu'à l'installation des institutions nouvelles. Le serment du Président de la République sera reçu par le Président du Haut Conseil de la République en Assemblée plénière. L'Assemblée Nationale sera installée par le Président du Haut Conseil de la République en présence des membres dudit Conseil.

Article 158

La législation en vigueur au Bénin jusqu'à la mise en place des nouvelles institutions reste applicable, sauf intervention de nouveaux textes en ce qu'elle n'a rien de contraire à la présente Constitution.

Article 159

La présente Constitution sera soumise au référendum. Les dispositions nécessaires à son application feront l'objet, soit de lois votées par le Haut Conseil de la République, soit de décrets pris en Conseil des Ministres. Les attributions dévolues par la présente Constitution à

la Cour Constitutionnelle seront exercées par le Haut Conseil de la République jusqu'à l'installation des institutions nouvelles.

Article 160

La présente Loi sera exécutée comme Constitution de la République du Bénin.



